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ABSTRACT

Intended to assist debaters and coaches who will be debating the 1983-84 national high school debate topic, this booklet combines discussion of general debate theory and information specific to the topic: "What changes are most needed in the procedures used in the United States justice system?" The eight chapters of the booklet contain (1) a discussion of the role of values in policy debate, affirmative analysis and case ideas, and negative analysis and case ideas; (2) a guide to resources; (3) an annotated bibliography on debating the justice system; (4) background on the topic selection; (5) perspectives and techniques for arguing topicality; and (6) a bibliography on debate. (HTH)

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A National Federation Publication for
the 1983-84 National High School Debate Topic

ED230999

DEBATING UNITED STATES JUSTICE SYSTEM

A PRELIMINARY ANALYSIS

U.S. DEPARTMENT OF EDUCATION
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Preface

The National Federation is pleased to offer a second annual publication to assist debaters and coaches who will be debating the 1983-84 national high schol debate topic.

Response to last year's publication indicated that this material is valued throughout the debate community.

Suggestions for change have been incorporated in the 1983-84 publication:

1. A more consistent editorial viewpoint has been maintained throughout the book. Readers should discover greater continuity among chapters.
2. The beginning chapter on arguing values in policy debates sets the tone for this edition. Other authors use the ideas developed in this chapter to analyze and interpret the 1983-84 debate topic.
3. The most popular item in last year's publication, "Arguing Topicality: Perspectives and Techniques," has been updated to apply to the U. S. Justice System Topic.
4. The collection of articles on debate theory has been updated and annotated. Advanced debaters and coaches should find these articles stimulating and helpful.

The National Federation, with its access to over 20,000 high schools throughout the country, is proud to use its extensive communication network to provide this important service to coaches and debaters.

The following page acknowledges the contributions of several high school and college people who have shared their insights and knowledge in this publication. A sincere thank you is acknowledged by the National Federation for their efforts.

Richard G. Fawcett, Editor

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Diana Prentice and Jack Kay co-authored the chapter on arguing values in policy debate. Ms. Prentice developed much of this material for high school workshops on Lincoln-Douglas debate. Dr. Kay worked with her to extend the analysis to policy debates. Ms. Prentice is Instructor of Speech Communication in the Communication Arts Department at Washburn University, Topeka, Kansas. Dr. Kay is Assistant Professor of Speech Communication and Director of Debate at the University of Nebraska-Lincoln.

John Gossett, Director of Debate at North Texas State University, authored the chapter on affirmative analysis and case ideas. Dr. Gossett wishes to thank Joel Rollins, Sherry Hall and members of the North Texas Debate Forum for their help in this project.

Walter Ulrich, currently the Director of Forensics at the University of Alabama, authored the chapter on negative analysis and case ideas. Dr. Ulrich will become the Director of Debate at Vanderbilt University in the fall of 1983. He wishes to thank the members of the University of Alabama debate team for their ideas on the topic.

Diana Prentice prepared the "Guide to Resources" for the 1983-84 topic.

Matthew Sobnosky and James Green, forensics assistants at the University of Nebraska-Lincoln, prepared the annotated bibliography on the 1983-84 topic.

H. David Fry, Associate Executive Secretary of the Illinois High School Association, authored the chapter on background for the topic selection meeting. Mr. Fry served as chairman of the Wording Committee this past December.

Stevan Kalmon, Director of Debate at the College Preparatory School in Oakland, California, and Richard Nelson, Director of Debate at Kennedy High School, Richmond, California, prepared the original study committee report which is reprinted in Chapter 5.

Michael Pfau, Associate Professor, Chairman of Speech, Drama and Communication and Director of Forensics at Augustana College in Sioux Falls, South Dakota, revised and updated the chapter on arguing topicality. An earlier version of this material was included in last year's *Debating United States Military Policy: A Preliminary Analysis.* Loral Deatherage co-authored the original chapter.

Michael Overing, a varsity debater at the University of Nebraska-Lincoln, prepared the annotated bibliography of periodicals on debate theory.

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CHAPTER 1

THE ROLE OF VALUES IN POLICY DEBATE

INTRODUCTION

"But coach, why should I have to worry about debating values?" asked the high school debater. "I'm in policy debate and that value junk is for Lincoln-Douglas." Undoubtedly, the preceding statement is frequently uttered by high school debaters. However, whether you realize it or not, you *have* been debating values throughout your participation in policy debate. Think back to the 1982-83 interscholastic high school policy debate topic on arms sales. One of the reasons to curtail arms sales given by affirmative debaters was that the weapons were used to violate the sovereignty and territorial integrity of neighboring nations. Think also about the 1980-81 debate topic involving consumer product safety. Negative teams argued that even though a mandatory seat belt law might save lives, the policy must be rejected because it constituted an intolerable intrusion by government into the affairs of private citizens. These negative debaters appealed to the value of free choice.

Despite the fact that policy debaters have always been at least somewhat concerned with values, there appears to be a great hesitation on the part of judges and debaters alike to rely upon values to determine the outcome of policy debate rounds. Marilyn Young writes: "For more than two decades the competitive debate community has actively avoided a confrontation with that type of resolution popularly known as 'the proposition of value. . . .' [T]he majority of the active debate community continues to push relentlessly toward policy debate based on quantitative (and, therefore, presumably, more rational) analyses." Young attributes the avoidance of value issues to "the attitudes of our technologically and scientifically based age. Perhaps it is indicative of a national outlook based on 'how much' rather than 'how good.' Just as likely, is the idea that value propositions, and therefore, value arguments, are impossible to 'prove,' or to evidence satisfactorily."[1] When confronted with a choice between "bodies on the flow" versus the violation of some cherished societal value, debaters and judges tend to opt for the "bodies."

While the "counting bodies" approach may appear the most clear cut, especially for debaters and judges who find it extremely difficult to weigh an intangible value against a quantification of lost lives, we believe the "bodies" approach forecloses a number of excellent options for policy decision-making and moves academic debate further and further away from the way in which policy debate is resolved in our nation's courts and legislatures. In short, we believe it is time that debaters and judges reexamine the role of values in policy debate. Our argument is developed in three stages. First, we will explore the nature of values as they commonly appear in policy arguments. Second, we will demonstrate that values are fundamental to most every policy controversy. Third, we will provide a number of methods by which debaters can better incorporate value argument in their debating.

THE NATURE OF VALUES

Before discussing the methods of debating values within policy propositions,

it is important to explore the nature of values. By definition, values represent standards for determining the relative merits of a behavior, condition, or thing. Values represent relative determinations of what is good/bad, desirable/undesirable, just/unjust, etc. One means of identifying values which can be argued within policy debate is to examine value classification systems. Generally, values are said to fit into one of four classes: artistic or aesthetic, moral or ethical, political, and utilitarian. The first category includes beauty, symmetry, good taste, and their opposites. The second set, moral and ethical, includes right and wrong, just and unjust, good and bad. Political values, the third category, have considerable significance for the policy debater. This list includes democracy, cost efficiency, rights, and law and order. The final category, utilitarian, includes effectiveness, practicality and solvency, terms that are familiar to policy debaters.

A second classification system was developed by Rokeach who lists values as terminal or instrumental. Terminal values refer to those associated with goals or desired states of existence. Instrumental values provide the means for attainment of terminal values or describe a desired mode of behavior. Terminal values include equality, freedom, family or national security, a world at peace, and self-respect. Instrumental values are ambition, honesty, independence, responsibleness, and broadmindedness (for a complete explanation of Rokeach's theory of values see Milton Rokeach, *The Nature of Values*)[2].

Rokeach's system suggests an important characteristic of values. Values do not exist independently of one another. Individuals and societies hold multiple values, and those values are interrelated in one of two ways. Values may be categorized as core and subordinate. Freedom is a core value, and the various types of freedom — speech, religion, or choice — are subordinate values. While a person may value all forms of freedom, it may not be possible to allow exercise of all forms on an equal basis. In making policy decisions, one form of freedom may need to take precedence over another to better guarantee the core value.

When the importance of a value is determined in relationship to other values, a values hierarchy is established. Values hierarchies are built by arranging subordinate values or by arranging competing core or subordinate values in order of importance. For instance, as Americans we value both freedom and national security. There are times when the government argues that certain types of freedom, for instance, of the press, must be subordinated to national security in order to ultimately protect the country and all forms of freedom. By claiming that one value should take precedence over another in given situations, a values hierarchy is established. It is values hierarchies which form the basis for clash in policy debate. Policies represent the embodiment of a value. Underlying competing policy options are competing values. By examining the values as well as the policies, a new dimension is added to policy debate analysis.

In summary, there are three important characteristics of values which debaters should keep in mind as policy arguments are developed:

1. *Values are commonly shared by a majority of society.* Rieke and Sillars claim that "there is a relatively limited and distinct group of value systems that can be identified,"[3] and Rokeach has observed that we probably have "tens of hundreds of thousands of beliefs, thousands of attitudes, but only dozens of values."[4] Because citizens of a country tend to accept the laws, customs, and cultural heritage of that country, it is not uncommon for them to share many of the same values — at least at the core level.[5] In the United States many of our values are embodied in the Bill of Rights and amendments to the Constitution. Thus, the

freedoms and rights guaranteed by the Constitution often provide the basis for clash in policy debates. Since most policy topics call for federal action, a states' rights position is commonly argued by the negative. The values basis of this argument is that states' rights deserve a higher position on the values hierarchy than safety or other values represented by the affirmative policy. In essence, a negative may argue that by giving priority to states' rights, the values defended by the affirmative are better guaranteed while preserving an all-important right. Because values are commonly held, it is possible for debaters to make these arguments without first proving that states' rights is a value.

2. *Values do not exist independently of one another.* As mentioned previously, all values cannot be achieved simultaneously or equally. In analyzing values conflicts, several possible causes form the basis for persuasion in debate:
   a. A core value is jeopardized by a subordinate value, e.g., personal safety is sacrificed to provide a fair trial.
   b. The values of a minority within society jeopardize the values of the majority, e.g., the current procedures in criminal courts represent the views of civil libertarians as opposed to the wishes of the public as a whole.
   c. A new system of values has overwhelmed the old and is superior. For example, it can be argued that many procedures in criminal courts resulted from actions by the Warren Court of the 1960s. The Burger Court represents a trend toward conservatism that is sweeping the country, and procedures should be aligned with the high court's sentiment now, not in 1965.
   d. The values of the minority must be guaranteed to protect the values of the majority. Using the criminal court topic, a negative could be shown to protect criminals, but unless the rights of criminals are protected, the rights of the majority are not secure.
3. *There are not correct values.* What distinguishes one set of values from another is the relative priority given to members of the set. Values positions should be argued from the perspective of what is the preferable hierarchical arrangement rather than the rightness or wrongness of a particular value. Regardless of where a value is placed on a hierarchy, it is, nonetheless, still a cherished belief. Thus, debaters must view values comparisons as they relate to a particular factual or policy context. All values *are* worth defending, but in specific contexts, some values are preferred over others. It is the ordering which is "right" or "wrong" rather than the value itself. Factual evidence which demonstrates the results of institutionalizing values through policies can demonstrate why there is a preferred hierarchy. By examining examples of actual public policy debates in the next section, the qualities of values discussed in this section will be made clearer.

VALUES ARE FUNDAMENTAL

In an analysis of value argument, Dale Hample wrote that "Values generate human decisions and dominate public discourse."[6] Because we agree that value questions are at the heart of public policy decision-making, we believe that exclusion of value issues from policy debate severely limits the quality of analysis and argument in academic debate. As we noted in the introduction,

policy debaters *do* address values. In fact, Rieke and Sillars have argued that "there is no such thing as valueless communication."[7] The problem, however, with the practice of policy debate by most debaters is that values remain at a subconscious level of argument and do not emerge as bases for decision rules in rounds.[8] In this section we will consider, through example, the fundamental role of values in our nation's decision-making processes as a means of demonstrating why debaters should bring values to a conscious level in policy debate.

Ziegelmueller and Dause noted that "many people are surprised to discover just how frequently arguments are based upon stated or implied value judgments."[9] Once a person acknowledges the existence of values in discourse, it is impossible to overlook the dominant role they play in even the simplest of decisions. Even a choice of restaurants or movies is a value decision. When one is acquainted with values language, it becomes easier to examine public policy deliberations as value argument. Several examples serve as proof that values are fundamental to policy choice.

Consider, first, two age-old debates — capital punishment and equal rights. At the root of the capital punishment debate are the issues of sanctity of life, justice, and restitution. Both sides of the debate argue for preservation of the same values, but by arguing from differing vantage points, each side views a different policy as best serving the values. When Chief Justice Earl Warren wrote the decision in the landmark desegregation case, *Brown v. Board of Education,* values were at the basis of the decision. In essence, the court determined which policy, "separate but equal" or integration, best served the values of equal protection and human dignity.

Perhaps one of the clearest examples of the dominance of values in decision-making is the Pentagon Papers case. Ziegelmueller and Dause explain the issues in the case: "In the 1971 clash between the *New York Times* and the federal government over the publication of the secret Vietnam war documents, known as the Pentagon Papers, both sides argued from value premises. The *Times* argued from the premise that the public's right to know was the most important value in the situation. The government, on the other hand, argued from the primacy of the value of protecting national security. Since these values provided the substance from which both sides reasoned, they must be thought of as data in this situation."[10]

More recently, the newspapers are filled with reports of debates centering on value issues: Barney Clark's artificial heart prompted discussion on the issue of life versus quality of life and the obligation of the medical community to use its knowledge to serve the many rather than the few; the El Salvador certification hearings are primarily an issue of protecting human rights; and the nuclear freeze debate is filled with moral issues relevant to life. In fact, the entire issue of national security often is reduced to a "guns or butter" debate over whether or not government has a greater obligation to social or military spending. Which, in fact, is the better route to protecting life and promoting quality of life?

In essence, no public policy issue is devoid of value arguments. Politicians, members of the media, and citizens often emphasize the values issues to the exclusion of more quantifiable issues such as dollars and cents or numbers of lives. Values are fundamental to our way of thinking, to our way of arguing, and to our way of legislating. The debater who ignores value issues in developing policy arguments does not fully exploit the potential of policy debate as a

tool for understanding decision-making. In the next section, we discuss how to make values a fundamental part of debating in the academic world.

PROBLEMS WITH DEBATING VALUES

Despite the emphasis placed on values by such real-world deliberative bodies as the Supreme Court and the U.S. Congress, it is clear that debaters have not done the same. Perhaps the clearest example of this deemphasis on values occurred during the 1981-82 high school debate topic dealing with minimum educational standards. The framers of this resolution envisioned a year in which a clash of values would dominate debate rounds. The expert literature surveyed by the topic study committee report author was filled with such value concepts as states' rights, freedom of choice, freedom of religion, and equal educational opportunity. Despite the intent of the framers, students spent very little time during the year debating the fundamental values as articulated by experts in education. Instead, debaters concentrated upon "dead bodies," i.e., lives lost due to the lack of CPR training in schools, nuclear war resulting from the lack of citizenship training, and infant and maternal mortality due to inadequate sex education programs in the schools.

We believe two reasons help account for the reluctance of debaters and coaches to give significant attention to value argumentation. The first reason involves the increasing use of cost-benefit analysis in both academic debate and real-world policy debate. In its simplest sense cost-benefit analysis involved a careful accounting of the advantages and disadvantages of any policy. In performing a cost-benefit analysis, policy-makers attempt to quantify the benefits and the costs of a policy. This type of analysis is fine for policies involving easily quantifiable factors, e.g., deciding to invest money in Ford Motor Company stock versus Chrysler stock. However, when policy controversies involve costs or benefits which are not easily quanitifed, cost-benefit analysis may discover that investing $10 million in a program requiring physical inspection of high school students for drugs as they enter school each day would result in a significant decrease in the amount of drugs present in school. However, cost-benefit analysis could lead us to ignore the loss of freedom involved in such an action because freedom could not be easily quantified. Brock, et al summarize the point we are making: "Public policy decision-makers and debaters have attempted to avoid the value judgments involved in the deliberative process. . . . The public policy decision-maker and debater of the future must realize that making value judgments is not an exact science. However, avoiding value judgments does not improve our decisions, rather, it limits our ability to arrive at better decisions by eliminating from consideration what might be important factors."[11]

The second reason for the lack of emphasis on values in policy debate is the fact that there is no clear theory or paradigm available for considering value questions in academic debate. Although many articles on value arguments have been written during the last few years, debaters still have no clear, consistent language or set of terms which address value arguments. The language for values discussed earlier provides a beginning for debaters who wish to highlight values in their argumentation. Closely related to the absence of a language system for discussing values is the lack of a clear model for value analysis. Typically, debaters have simply used the stock issues model of policy analysis in their consideration of value issues. Unfortunately, the language of the policy stock issues model is not sufficiently precise to include methods for reaching

value decisions. Matlon, citing Jack D. Ray, makes the point: "Too much of our value argumentation involves 'fuzzy edges,' like fleecy clouds."[12] Although several writers have developed stock issues models for value analysis, these too have proven vague and non-directive.

One stock issues model for questions of judgment is provided by Ziegelmueller and Dause. They indicate that status (stasis) analysis is useful when considering questions involving both factual and value arguments. Three stock issues or frames of analysis are identified. First, debaters are encouraged to identify or define the nature of the value judgment — *the frame of definition.* Before we can say that a particular policy violates "freedom," we must define the term. To accomplish this act of definition, Ziegelmueller and Dause suggest debaters turn to "the specific subject matter area of the controversy. . . . In controversies involving moral judgments, religious and philosophical sources will be helpful in suggesting criteria. . . . In situations involving personal value judgments, the criteria may have to be derived, in part, from the audience's values."[13]

After precisely defining the value, Ziegelmueller and Dause suggest that debaters consider the "total circumstances surrounding" the judgment — the frame of *existence of fact.*[14] Using our earlier example of "freedom," the debater would seek to determine if, in fact, freedom was being violated.

The third stock issue in propositions of judgment involves the *frame of quality.* Ziegelmueller and Dause state: "The frame of quality is intended to alert the advocate to the fact that there may be certain special criteria or unusual facts which need to be considered before a judgment can be made."[15] Ziegelmueller and Dause use the example of the insanity plea in a court of law. The accused may have, in fact, committed a defined crime, but is pronounced innocent because of the quality consideration of being insane at the time the crime was committed. In short, the frame of quality tells debaters that the perspective they take toward a fact must be tempered by quality considerations.

On the basis of the stock issues model for propositions of value, Ziegelmueller and Dause suggest three questions debaters should ask when considering value arguments: "(1) Does the value really represent a good? (2) Is there a more important value? (3) Is the meaning of the value properly interpreted?"[16]

A similar scheme is offered by Verch and Logue. They synthesize a number of previous views[17] and develop a five-part process for value clash resolution:

Step One: Identify the value to be affirmed and the value to be refuted.
Step Two: Present the criteria to be used to resolve the value conflict, and demonstrate why it is reasonable for resolving this conflict.
Step Three: Apply the criteria to the value to be affirmed and show why the criteria is met.
Step Four: Apply the criteria to the value to be refuted and show why the criteria, although reasonable, is not met.
Step Five: Demonstrate why winning this value conflict should resolve the conflict over winning the ballot.[18]

Although the stock issues model for analysis of value propositions suggested by Ziegelmueller and Dause and the value clash resolution approach proposed by Verch and Logue seem useful, they both fall short of providing a complete scheme for analyzing value issues. Perhaps the key difficulty of the approaches is that they do not give debaters useful guidance for deciding which criteria to

select in defining values and how to determine whether one value truly outweighs another value. Granted, the authors suggest that debaters should turn to the subject matter for the controversy in order to discover criteria. However, in every true value controversy, there are many different criteria being suggested. The fundamental battle generally involves a struggle between several different values for a position on society's value hierarchy. Hence, simply pointing debaters to the subject area does little to guide them once they get there.

Other writers have attempted to deal with the problem of how to decide between competing values and how to justify a value as important. What has emerged we shall term the "populist" approach to value argumentation. The populist approach begs the question of whether one value is truly more important than another. Instead, the approach suggests we decide the importance of values on the basis of popular and long-standing support. For example, Robin Williams in *American Society*, suggests that criteria used to resolve value conflicts include such ideas as the pervasiveness of the value, the credibility of those who support the value, and the chronology of the value." What the populist approach amounts to is deciding value priorities on the basis of the number of people who accept the values. Such a conservative process, although having merits from the perspective of negative teams, is certainly frightening to affirmative teams who must engage in change. Relying upon such an approach would also have prevented such important social movements as civil rights and sexual equality. Perhaps the populist approach to values serves as another reason values are not the focus of policy debate.

WHY WE SHOULD DEBATE VALUES

The previous sections have demonstrated the importance of values and the fact that value positions are common to "real world" argumentation and decision-making. In addition to these clear intellectual and educational justifications, debating values in policy propositions offers several practical benefits as well.

First, by carefully analyzing the value clash that exists between the resolution, the present system, and competing systems, debaters may find overall positions which help them to better deal with broad debate resolutions. For example, in exploring the resolution "That the United States should establish uniform rules governing the procedure of all criminal courts in the nation," debaters may discover that the fundamental value of the proposition deals with "equality under the law." This value or goal would thus become the central focus of most affirmative cases. Clashing with this value might be the right of the state to determine the procedures that best protect its citizens. Hence, the values argued by negative debaters would center around the political value of states' rights and the utilitarian value of safety. Such focusing could greatly aid debaters in deciding upon affirmative cases and negative positions. By having a philosophical basis for either an affirmative case or a negative position, debaters can develop arguments that flow logically from a values hierarchy. This is especially helpful for second negatives since generic arguments can be applied more specifically to an affirmative in terms of how the case violates a hierarchy and subsequently produces a disadvantage.

A second practical benefit derived from studying the values inherent to policy propositions is that value positions help debaters conceptualize in rebuttals. One of the problems frequently experienced, especially by novice debaters, is not knowing what to do with their series of constructive arguments as they enter the

rebuttal speeches. The judge is often left with a large number of arguments and no explanation from the debater as to how these arguments fit together to form a basis for voting. Taking a value position could certainly help to pull together and weigh arguments. Being able to explain why one value should occupy a higher position on the value hierarchy than the opponent's value would certainly be helpful in providing the judge with a decision rule.

The third practical benefit is that value positions provide debaters with a rather effective method for dealing with the "spread" as well as with "squirrel" cases. A common complaint echoed by debate coaches is that too many teams "dump" large numbers of arguments and/or use "squirrel" cases. Debaters who have performed a careful value analysis of the controversy will find themselves better able to handle such tactics. For example, in debating the topic "Resolved: That the United States should adopt uniform rules governing the criminal investigation procedure of all public law enforcement agencies in the nation," negative teams may claim such disadvantages as unfairly infringing upon states' rights, compounding inefficiency by turning to federal control, allowing the guilty to go free by liberalizing conservative state systems, along with a host of similar arguments. Affirmative debaters, by proving the priority of equal protection on a value hierarchy, may be able to go so far as to grant the disadvantages and argue that even if true, they fail to outweigh the higher value. Similarly, since even most "squirrel" cases will be an extension or subset of the proposition's basic values, negative teams may discover that many of their value positions do apply.

HOW VALUES CAN BE DEBATED

The purpose of this section is to provide debaters with some practical suggestions for dealing with values as they relate to policy propositions. Ziegelmueller and Dause suggest that academic debate may properly be divided into two phases: inquiry and advocacy.[20] The responsible advocate, before adopting a position, conducts careful inquiry into the issues with which the resolution is concerned. Following this careful inquiry the debater then advocates or presents a position.

Values in the Inquiry Process

Before debaters can exploit the values dimensions of arguments in the analysis stage, it is important to become acquainted with the language of values. Several of the sources discussed in the section of this paper on the nature of values are recommended as preliminary reading before beginning topic analysis. Specifically, debaters should read Rokeach and Redding and Steele. Once value terms are part of a debater's vocabulary, then it is necessary to read background information with an eye to discovering the values terms identified with current policies or with suggested new policies. While not on the current topic, an excellent example of the popular press' use of value terms is found in a *Newsweek* article on the "squeal rule" which requires federally-funded, family-planning clinics to inform parents of minors that the minor has received a prescription for birth control pills.[21] In describing the arguments on both sides of the rule, *Newsweek* employed the following value terms: "right to privacy," "discrimination," "family business."

After the debater understands the language that is available, four questions should be addressed at the inquiry stage. First, the debater should ask: *What values underlie existing policy?* Obviously, the best place to discover these

values is to search out debates by experts in the field. On the justice system problem area debaters will find excellent debates in law journals. Many law journals provide an extensive discussion of the pro and con arguments on the given subject. In addition, debaters should examine court decisions. Supreme Court decisions dealing with criminal court issues will present bases for the decisions in terms of protecting rights, freedoms, or constitutional guarantees. Interviews or press accounts of lawyers' statements on trial procedure will expose the constitutional guarantees or values that the lawyers see at issue. Debaters may also find such historical works as the *Federalist Papers* very helpful in discovering the arguments used in the past to justify such values as freedom, equality and individual liberty. Several questions should be asked as debaters examine the past debates: What value language is used by the experts? Which values are emphasized more than others? Is there a certain value labeled "the most important consideration"?

Second, the debater should apply the same analysis to the proposed policy change and ask: *What values underlie the proposed resolutional change?* Again, turning to past and present debates will be useful. Examining the dissenting opinions in court decisions should prove especially helpful. Debaters should look to see if proponents of change argue from different value premises or if they use the same values in a different order.

The third question requires debaters to search out relationships: *What are the various value hierarchies present in the controversy?* Individuals arguing from a civil liberties perspective typically construct a value hierarchy in which the rights of the individual are paramount. Opponents of this view argue that the ultimate good must lie within a safe society. Both sides subscribe to the same values — protecting society and freedom — but argue that different values are more important to achieving that freedom. The civil liberties hierarchy would rank order values as follows: (1) Freedom; (2) Rights of the individual; (3) Protecting society. The societal rights value hierarchy shifts the order of 2 and 3: (1) Freedom; (2) Protecting society; (3) Rights of the individual. Debaters should seek to discover the order of values for both the affirmative and negative positions.

The fourth question debaters should ask in the inquiry process is: *How are/can differing values be justified?* Fundamentally, this question is used by affirmative debaters to establish the significance of their harm and by negative debaters to demonstrate the impact of their disadvantages. Typically, most academic debates are not terribly concerned with value justification. Instead, debaters suggest a popular value or goal and simply show how the plan achieves that goal. We urge debaters to take the additional step and discover precisely *why* the goal or value is important. Debaters should pay heed to the second suggestion given in the "nature of values" section of this article: Values do not exist independently of one another. Patterson and Zarefsky make a similar point: "advocates seek criteria by which one value can be placed above the other. Perhaps one value is necessary for the existence of the other; perhaps one enhances some third value more than the other; or perhaps one satisfies a basic human need better than another."[22]

Values in the Advocacy Process

Many of the suggestions provided in the "values in the inquiry process" section of this article can be directly applied in advocating or refuting value positions in debate rounds. This section offers some additional advice.

First, debaters should attempt to identify the value premises which underlie the policy positions presented by their opponents. Earlier we argued that virtually every policy has at its root a value judgment. The first step is to indicate to the judge the explicit value behind the policy. Cross-examination is an excellent time to get at the underlying value

Second, debaters should require their opponents to not only identify the value, but to *justify* it. Matlon suggests two steps or "stock issues" in this justification process. First, defenders of values have a burden to clearly define the value Matlon writes: "before the validity of an ethical judgment can be established the nature of the value employed must be described and defended."[23] Matlon argues that this requirement is a basic stock issue of value argument. Thus, if a team advocating a value position cannot meet it, the resolution has not been affirmed. Second, Matlon identifies the "designative" issue. In simpler terms, this issue tests whether or not the resolution or proposed policy satisfies the condition set up in the first stock issue for value — the definitive issue. Matlon indicates: "the designative issue assumes the adoption of a moral standard and proceeds to assess that standard in a particular situation." On the criminal justice topic the designative issue might ask if uniform procedures do, in fact, satisfy the need for equality.

A good example of the use of the definitive and designative issues occurred during the 1980-81 intercollegiate debate season on the labor unions topic. Several affirmative teams argued for plans which sought to promote democracy within labor unions. Many of these teams simply argued that democracy was an assumed value that is cherished. Several debate rounds were won by a negative team that challenged the value judgment being made at both the definitional and designative issue level. The negative argued that in order to accept a value position, the affirmative must clearly define the value. In addition, the negative read considerable evidence that indicated the notion of democracy in labor unions was a very fuzzy concept and not carefully defined in the literature. Several judges found this position impressive and indicated on the debate ballot that given the absence of a clearly defined value, the resolution should not be affirmed.

Third, debaters should consider whether or not to accept life as the most fundamental value. Although life is certainly as good at the prima facie level, there is growing support that life itself should be held subordinate to other values. Debaters might consider arguing, as is proposed by supporters of euthanasia, that the quality of life is far more important than life itself. This issue is particularly important in dealing with cases which are questionable on topicality grounds. Many "nontopical" cases develop from a topic because debaters begin analysis of a resolution by considering where they can find the most dead bodies. They then work backwards to justify their case as topical. By forcing affirmatives to justify life as the ultimate goal or by making negatives defend values other than life as the central focus of the topic, topicality arguments can extend beyond an exercise in comparing definitions. Debaters have a means for analyzing the reasons why a topic is controversial and worthy of debate rather than whether or not it fulfills a reasonability standard on a definitional level. The former arguments are more substantive and more realistic in terms of why the merits of an issue are discussed in policy-making contexts.

CONCLUSION

While we do not expect a major shift in debaters' strategies away from quan-

tifiable advantages and disadvantages, we are hopeful that debaters will take advantage of the values positions inherent in the 1983-84 debate topic. The Wording Committee analysis, reported elsewhere in this book, suggests that affirmative cases deal with "discovery, pre-trial detention, speedy trial, venue, jury selection, jury instructions, the federal code, media controls, protection of witnesses, sentencing, and plea bargaining." Procedures in all of these areas are clearly related to the values of justice, equality, protection of society, and overall human rights and freedoms. By beginning both affirmative and negative analysis with a discovery of how these values affect current procedures in criminal courts, debaters can locate persuasive arguments supporting maintenance of current court proceedings or initiation of new areas. Values are not the exclusive province of the Lincoln-Douglas debater. They have always played a role in policy debate, and we urge debaters to exploit that role fully.

NOTES

[1]Marilyn J. Young, "The Use of Evidence in Value Argument: A Suggestion," in *Proceedings of the Summer Conference on Argumentation,* eds. Jack Rhodes and Sara Newell (SCA/AFA, 1980), p. 281.

[2]Milton Rokeach, *The Nature of Values* (New York: The Free Press, 1973).

[3]Richard D. Rieke and Malcolm O. Sillars, *Argumentation and the Decision-Making Process* (New York: John Wiley & Sons, 1975), p. 119.

[4]Milton Rokeach, *Beliefs, Attitudes and Values* (San Francisco: Jossey-Bass, Inc., 1968).

[5]For a discussion of the cultural nature of shared values, see Edward D. Steele and Charles W. Redding, "The American Value System: Premises for Persuasion," *Western Speech Journal,* 26, (Spring, 1962), pp. 85-90; Rieke and Sillars, pp. 131-133.

[6]Dal Hample, "Testing a Model of Value Argument and Evidence," *Communication Monographs,* 44, (1977), p. 106.

[7]Rieke and Sillars, p. 122.

[8]For a discussion of decision rules and value argument, see Carl D. Flaningam, "Value Centered Argument and the Development of Decision Rules," *Journal of the American Forensic Association,* 19, (1982), pp. 107-114.

[9]George W. Ziegelmueller and Charles A. Dause, *Argumentation: Inquiry and Advocacy* (Englewood Cliffs: Prentice-Hall, 1975), p. 51.

[10]*Ibid.*, p. 51.

[11]Bernard L. Brock, James W. Chesebro, John F. Cragan, and James F. Klumpp, *Public Policy Decision-Making: Systems Analysis and Comparative Advantages Debate* (New York: Harper & Row, 1973), pp. 82-83.

[12]Ronald J. Matlon, "Propositions of Value: An Inquiry into Issue Analysis and the Locus of Presumption," in *Dimensions of Argument: Proceedings of the Second Summer Conference on Argumentation,* eds. George Ziegelmueller and Jack Rhodes (AFA/SCA, 1981), p. 497.

[13]Ziegelmueller and Dause, p. 43.

[14]*Ibid.*, p. 44.

[15]*Ibid.*, pp. 44-45.

[16]*Ibid.*, p. 79.

[17]Douglas Ehninger and Wayne Brockriede, *Decision by Debate* (New York: Harper and Row, 1978); Windes and Hastings, 1965; and C. R. Smith and D. M. Hunsaker, *The Bases of Argument: Ideas in Conflict* (New York: Bobbs-Merrill, 1972).

[18]Stephen L. Verch and Brenda J. Logue, "Increasing Value Clash: A Propositional and Structural Approach," in *CEDA Yearbook 1982,* ed. Don Brownlee, CEDA, 1982, p. 27.

[19]Cited in Verch and Logue, p. 27.

[20]Ziegelmueller and Dause.

[21]"A New 'Squeal Rule,'" *Newsweek,* February 7, 1983, p. 24.

[22]J. W. Patterson and David Zarefsky, *Contemporary Debate* (Boston: Houghton Mifflin, 1983), p. 26.

[23]Matlon, pp. 497-498.

CHAPTER 2

AFFIRMATIVE ANALYSIS AND CASE IDEAS

CASE CONSTRUCTION

When on the affirmative, debaters are like crusaders. Whether enhancing a value, ensuring a process, saving human lives, or promoting a cause, affirmative teams should have, as a single focus, persuading the judge to accept a policy option designed to bring about a particular benefit. While the affirmative team should concentrate on a single policy alternative, it should remember that policies are not adopted in a vacuum; instead, policies must be acted upon after considering many constraints and competing values. Thus, affirmatives should understand that a systems approach to the topic is necessary in order to guarantee efficacy and workability.

Presumption

Before examining specific terms and cases relevant to the 1983-84 high school debate resolution, it is important to review some of the key aspects of debating on the affirmative. Frequently, this author asks a single question to interested high school students: Which side is winning the debate before either side has spoken? The most frequently heard answer is, "neither side is winning until a speech is given." While this answer might be correct when considering a football game or a soccer match, it is incorrect for the game we call debate. In a debate, if the judge were forced to render a decision prior to start of the first affirmative constructive, that decision must be for the negative team. The reason for this is known as *presumption*. Presumptively, the negative team is winning before anything is said in the debate. Similar to a criminal trial, the defendant need say nothing until the charges against him have been presented. In a debate round, it is the status quo (or present system) that is on trial, rather than a defendant. We presume that the status quo is innocent until someone (hopefully, the affirmative team) indicts the status quo. Simply stated, presumption is an assumption that the current state of affairs will continue unless good and sufficient reason for change is given. This is not to say that the status quo is good, but rather that it merely exists. Rarely, if ever, do public policies work precisely as intended for all circumstances. However, since the status quo policies are already in effect, we presume that there was some reason for those policies to be enacted. Furthermore, we presume that those policies will continue unless, at some point, it becomes necessary to enact new policies. Since there is inherent risk in any change, and since status quo policies are a known quantity, policy-makers hesitate to make changes unless demonstrable benefits of the proposed changes outweigh possible disadvantages. Hence, there is a hesitancy to enact new policies due to an inherent risk factor.

Burden of Proof

A concept similar to presumption is *the burden of proof*. This concept refers to the requirement that the affirmative team must not only indict the present system, but must go beyond that and prove that the resolution is significantly superior to the present system. In reality, the affirmative team has the burden to

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overcome presumption. This is related to presumption in that if the affirmative does not meet its burden of proof to overcome presumption, then the negative should win the debate. The burden of proof does not imply that the negative team has no burden. Negatives may not simply challenge and assert claims, without offering rationale and evidence. Each team in the debate has a burden of rebuttal which requires that team to clash with the other team. This burden is distinct from *the* burden of proof, however, which rests totally and solely with the affirmative.

Prima Facie Case

It is often asked how an affirmative team can meet this burden of proof to overcome presumption. Quite simply, this can be accomplished by the presentation of a *prima facie case.* A prima facie case is one, presented by the affirmative, which in and of itself provides good and sufficient reason for changing the status quo. The components of a prima facie case are significance, inherency, and plan solvency. In order to be prima facie, the affirmative must present, in the first affirmative constructive speech: 1) the need for a significant change in the status quo, 2) reasons for the absence of change in the present system, 3) a specific plan by which the needed change is to be accomplished, and, 4) evidence of plan efficacy in diminishing the harm. Failure to present even one of these areas in the first speech would be sufficient reason for the judge to vote negative before the first negative speaker ever utters a word. Given the importance of this concept, affirmative teams should carefully prepare cases, making sure that each requirement of the prima facie case has been satisfied.

It should be noted that the issue of topicality has not been referred to as one of the elements of the prima facie case. The reason for this is that prima facie issues are those which the affirmative team must both introduce and win in order to win the debate. Topicality is an equally important, yet separate issue. Of course, topicality of the plan is an absolute voting issue. If the affirmative plan is not topical, and if the negative team introduces the argument successfully, then the negative team should be awarded the decision, regardless of any other issue in the debate. If, however, the negative team does not forward a non-topicality argument, then the judge should presume that the affirmative case is topical. Topicality, then, is an absolute issue, but not a prima facie requirement.

At summer institutes and other lecture/analysis sessions, debaters ask, "What type of case is best?" One often hears high school debaters extol the virtues of a particular format for structuring affirmative arguments. In reality, it makes very little, if any, difference what type of case one uses. In reading the contemporary literature, one will find such terms as: need-plan, comparative advantage, goals-criteria, modified stock issues, modified comparative and advantage. The format selected is of little importance. As long as the prima facie requirements are included in the case structure, the "name" given to a particular case is irrelevant.

AFFIRMATIVE RESPONSIBILITIES

In order to help students understand how to win on the affirmative, a brief review of affirmative burdens is necessary. The burdens of the first affirmative constructive speech (1AC) are simple, yet well-defined. After briefly introducing the exact wording of the resolution, the affirmative should define terms.

Virtually any argumentation textbook will enumerate several acceptable methods for accomplishing this task. One of the best and most effective ways of defining terms is through operational definition. In using this method, the affirmative is, in effect, saying that each term will not be wrenched from its context and defined individually. Instead, it will be defined contextually within the affirmative plan, which should then immediately be presented. The first 1AC burden, then, is to define the terms in the resolution.

The second 1AC burden is to present the affirmative plan. The plan is the affirmative's specific desired example of how the resolution should be implemented. A plan is simply a piece of proposed legislation. At the end of the round, the judge will be asked to enact that legislation into law by voting affirmative. Of course, affirmative plans as pieces of legislation cannot be as lengthy as a Congressional bill which may run on for hundreds of pages. The plan, therefore, should be a skeleton outline of the legislation; but it should be as specific as possible. Most plans will have five provisions: administration, mandates, funding, enforcement, and intent. The agency of administration should be the agent charged with implementation and administering the mandates. Some resolutions specify the agent of change, but the 1983-84 high school resolution does not. Some resolutions will read, "Resolved: That Congress should . . ." In such cases, the affirmative agency of administration would have to be congressional. This year's resolution, however, merely says that the United States should establish the uniform rules. The specific agent of change is left to the discretion of the affirmative. More will be said about implementation later under the topic of fiat.

Plan Provisions

Should the affirmative plan need an agency of administration, the 1AC should specify that the members of the agency (or board of commission) will be provided all necessary staff, salaries, and minimal administrative powers necessary to carry out the mandates of the plan. In addition, the affirmative should have some method of reviewing agency decisions, remembering that there is a need to protect against misfeasance (when board members act when they should not act), malfeasance (board members acting in a wrongful manner), and malfeasance (failure of board members to act when they should have acted).

The second plan requirement is the mandate. This most important provision is where the affirmative team specifies what actions will be taken by the plan. The mandate section is the one which will garner the advantage(s), and therefore should be carefully constructed in order to notify the negative team and the judge what the plan will do, as well as what it will not do.

The third plan provision should be funding. Since most legislation involves some expenditure of money, the affirmative team should make sure that its proposed legislation will have sufficient funding. It is unnecessary for the affirmative to specify precisely where the money will come from. Usually, general federal revenue is a sufficient source.

The fourth plan provision is enforcement. While most affirmative teams will argue that the plan will not be violated, some provision for enforcing against those who attempt to get around the plan is needed. Actually, the enforcement provision is included to serve as a deterrent to those who might want to violate the plan, as is true for most criminal statutes.

The final plan provision is an intent plank. The intent plank is a device used

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by the affirmative to reserve the right to explain or interpret the plan. The intent plank should not be abused by the affirmative team who wants to alter or amend the plan during the debate; it is merely a device for clarifying some aspect of the plan if questioned by the negative team.

Plan Functions

Since the plan is one of the focal points of the debate, it is also among the most controversial parts of the debate. Many coaches and judges see differing functions of the plan. Many of them will indicate that the plan serves as a "jumping off" point for the debate, and merely serves to get the clash over issues started. This should not be the case. In order for the affirmative team to meet its prima facie burden of presenting a plan, that plan must be introduced in 1AC, and it must be the exact same plan throughout the debate. The affirmative team is bound by the resolution, and consequently is bound to support a single policy proposal throughout the debate. If plans could be altered or amended during the debate, or if certain planks of the plan found to be objectionable because of a disadvantage, could be thrown out or jettisoned by one of the affirmative rebuttalists, then it would be extremely difficult for the negative to ever win the debate since the affirmative has the last speech.

Plan Fiat

Another controversial aspect related to the plan concerns how it will be implemented. In order for academic debate on a proposition of policy to take place, certain assumptions must be made. One of those assumptions or conventions is known as *fiat*. The affirmative has the right to fiat its plan into existence. At the end of the round, if the judge votes for the affirmative team, there is an assumption that the plan will be implemented into law. Were the affirmative team not granted this right, no affirmative team could ever win a debate because the negative team could merely grant the affirmative inherency (reasons why the plan has not been adopted already), and then claim that those inherency barriers would prevent the plan from being adopted. Without fiat, the same inherent attitudes and structures that prevent the status quo from adopting the plan would prevent the affirmative team from adopting the plan. Therefore, fiat is a convention whereby the debaters assume for the purposes of academic debate that the plan would be implemented if the judge votes affirmative. Given that, it would be illogical for the negative team to argue that "Congress will not adopt the affirmative plan," because the affirmative could respond with the argument that "this is 'should-would' because fiat assumes plan implementation." The debate, then, should center on whether or not the plan *should* be adopted, not whether it *will* be adopted.

While fiat is a necessary convention for debate on policy propositions, it is not a "magic wand" which allows the affirmative to defeat all plan objections. Fiat is merely an assumption for the purpose of debate, that the plan will be implemented through normal democratic procedures. Fiat allows the affirmative to assume that when voted for, the plan will have been introduced in Congress, discussed in committee hearings, debated on the floor of both houses of Congress, passed by both houses, and signed by the President, becoming a law. Fiat does not assume that all those in a decision-making capacity who are against the plan will magically be transformed into supporters of the plan. The affirmative cannot "fiat away" those attitudes and bureaucratic biases which prevent status quo implementation of the plan. If the affirmative plan does not

mandate the overturning of a United States Supreme Court decision (for instance the *Miranda* decision requiring police to follow certain procedures during arrest), then the affirmative cannot assume through fiat that the Court would not follow its thinking in *Miranda* in looking at, reviewing, and ruling on the affirmative plan.

While it is true that the affirmative cannot fiat attitudes of opponents of the plan, it is also true that in some instances attitudes will change once the plan is implemented. For example, in the early 1970s, the citizens of Boston opposed desegregation of the school system. Ordinances were passed which prevented the Boston school system from following a course of racial desegregation. However, once the judge in the U. S. District Court ruled that desegregation would take place, in compliance with the 1954 U. S. Supreme Court ruling in *Brown v. Board of Education,* the citizens of Boston accepted the *fait accompli* and proceeded to integrate the school system in an orderly fashion. When presented with a "We can't stop it so we might as well go along with it" argument, the citizens changed their attitudes. It is important to note that this is but one example. More often than not, opponents of specific policies continue to express disapproval so that policy implementation and compliance may take several years to be accomplished. Many of the values referred to earlier in this book come into play in this argument. The wise affirmative team will be the one which thoroughly researches its plan antecedents to see which values are shared by those who will be affected by the plan.

Stock Issues

Significance

After defining the terms and presenting the plan, the 1AC should develop the stock issues of significance, inherency, and solvency. Under significance, the affirmative should seek to enumerate and explain the harm(s) caused by the lack of the affirmative plan. On this year's resolution, the affirmative would want to show that some value is being undermined or that someone is being harmed because the affirmative plan has not been adopted. Inevitably, affirmative teams must decide on what type of significance to claim: quantitative or qualitative. Most debaters feel more comfortable with quantitative significance, i.e., numerical significance. Frequently it is easier to say that 10,000 murderers go free or that 12,000 innocent persons are convicted because of some inequality or practice in the criminal court system. However, simply because it is easier to count than to explain does not mean that quantitative significance is best. As the previous chapter on value analysis suggests, there are many intangible values which cannot be enumerated, but are still very important.

One of the most decisive acts that a nation can take is the decision to go to war. Why do we take that step? Is it because we want to prevent loss of life? Usually not, because in a war the loss of life is certain. We take that momentous step because of values that we hold dear. Therefore, debaters should not shy away from qualitative significance, simply because it cannot be numerically quantified. The values of free press, fair trial, personal privacy, and due process of law, are all extremely crucial to preservation of the constitutional government which we cherish.

The most important decision that any affirmative will have to make on this year's resolution is how to weigh significance. Some affirmative teams will decide that in order to guarantee a fair trial for all defendants, the press should not be allowed to report on the trial while in progress or televise the proceedings

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of the trial. In such situations, one may expect the negative to offer a disadvantage based on the first amendment, which proscribes any law which abridges the freedom of the press. Therefore, the debate may come down to which freedom is more important, free press or fair trial. Debaters should be prepared to explain and provide a rationale regarding how these two fundamental rights should be weighed. In addition, the debaters should be prepared to explain how to weigh a qualitative advantage against quantified disadvantage. This is a decision that should not be left to the judge, because that judge may not view the world in the same way the debater does. To protect against this, the debater should do the evaluating in the round and present the rationale to the judge in the course of the argumentation.

Inherency

The second stock issue which should be presented in 1AC is inherency. In many debates, inherency becomes an issue which is ignored. This practice is unfortunate because the concept is extremely important to the process of inquiry and advocacy which seeks reasoned judgment on a given resolution. For those who are just beginning to debate, an understanding of and appreciation for what is meant by inherency is essential. The term "inherency" in the academic debate context is synonymous with "cause." In examining inherency in a round, one seeks to discover *why* the status quo has allowed the conditions (harms) described by the affirmative to persist; one wants to know the *cause* of the problem.

Some affirmative teams may feel that they do not have to isolate the cause of the problem because they have shown a harm in the status quo and a plan that will solve that harm. They may claim that the existence of a harm shows that the present system is incapable of solving that harm. This is a poor strategy because if the affirmative team refuses to isolate the cause of a particular problem, then it cannot guarantee that the plan will eliminate the cause(s) of that problem.

In a complex, dynamic, ever-changing society, national problems rarely, if ever, have a single cause. Unless the affirmative team can specify the precise causes of the problems, the presumption should be against the plan as a solution. Otherwise, policy makers would not know if the plan eradicates the causes that led to the existence of the problems.[1]

Inevitably, in high school debates where inherency is argued, the argument arises concerning what type of inherency is necessary. One often hears that structural inherency is the strongest type, followed by attitudinal and existential inherency. With the exception of existential inherency (often referred to as the lack of inherency) which is discussed above, there is little difference between the types of inherency. Judges are often told by debaters that structural inherency is stronger because it refers to a law which prevents the problem from being solved, while attitudinal inherency only deals with people's attitudes.

Attempting to discern a difference between the two terms may be irrelevant. *All* inherency is attitudinal. Why do structures of government (Congressionally-passed laws, administrative rules of the executive agencies, and decisions of the U. S. Supreme Court) exist? Structures exist because persons with the authority and capacity to enact those structures had the attitude that those structures were needed. Laws exist because a majority of each house of Congress had the attitude that the laws were desirable. Many criminal court procedures exist because the Supreme Court thinks those procedures are necessary for securing a certain right promised by the U. S. Constitution. Structures emerge from the

attitudes held by people.

Solvency

The third stock issue which the 1AC should present is solvency. The affirmative has the burden to demonstrate that the proposed plan will, to some significant degree, diminish the harms presented. It is, of course, somewhat unreasonable to expect the affirmative team to solve every known instance of harm resulting from the lack of the plan. However, the affirmative does undertake a rather significant burden of demonstrating that a large part of the harms isolated will be alleviated upon adoption of the plan. Because the judge will most likely, at the end of the debate, weigh the amount of harm solved by the plan against the 2NC disadvantages, the affirmative team needs to understand and be willing to explain its solvency. One thorny problem that frequently appears is whether or not the harm can be reversed. An affirmative may claim that some procedure currently practiced in the criminal courts is causing harm to a segment of society. The affirmative implements a plan to remedy that harm. Is it not possible that the harm might cease to occur, but the plan provides no relief to those already hurt? If so, then the affirmative must be willing to admit that whatever value being sought will still be denied to some.

FEDERALISM

One of the major concepts with which affirmative teams must be prepared to deal is the concept known as *federalism.* When one speaks of the United States being governed under a federal system, what is meant is that the people are governed under a dual system: a national government and a state government. Virtually any criminal justice textbook will, at some point, define what is meant by federalism. One text indicates: "Federalism is an organizational system in which two of the levels of government — national and state — have independent powers."[2] The concept of federalism is based on the Tenth Amendment to the U. S. Constitution, which was ratified by the states in order to insure against a totalitarian national government. The revolutionaries, fearful of the vast power that had been wielded by the British government, wished to retain many of the powers traditionally exercised by national governments in the hands of the states. Consequently, they insisted that the Tenth Amendment be added to the Constitution. That amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[3]

Affirmative teams need to be aware of the implications of federalism, for it is sure to be one of the negative arguments frequently lodged. The first implication of federalism is that it provides for a dual system of governance. The national government, for instance, has virtual total supremacy in foreign relations and interstate commerce. On the other hand, the states have most of the police powers exercised by government. When a person commits a crime such as murder, rape, assault and battery, robbery, i.e., the familiar violent crimes, prosecution for that crime will normally be pursued in a state court, because every state in the union has a statute proscribing these acts. However, when a person commits a crime such as kidnapping, aircraft hijacking, or income tax fraud, that person has violated a national government statute, and, consequently, will be prosecuted in the federal government court system. Hence, in some areas, the difference between what is a state offense and what is a federal offense is strictly defined. It is important to note that the seriousness of the

offense does not govern the jurisdiction where the case will be prosecuted. Certainly murder is a very serious crime, but most murder prosecutions (with the exception of murdering an official of the federal government) are conducted in state courts.

While most crimes are strictly defined as being either federal or state crimes, in some cases both the national government and the state government will have statutes proscribing the act. One example concerns many of the narcotics laws in this nation. The national government maintains statutes against bringing certain drugs into this country, and, at the same time, many of the states have laws prohibiting those same drugs. In such cases, when a person is caught violating the law, the prosecutors must decide whether to charge the defendant with the violation of national law or the state law. Our system does not permit a person to be tried twice for the same crime. This principle, known as double jeopardy, is embodied in the Fifth Amendment to the U. S. Constitution. It prevents a person from being tried more than once for the same offense.

Many negative teams will argue that since the police powers, i.e., those powers of enforcing state laws are reserved by the states, then the affirmative plan which places a federal (national) restriction on the operation of state criminal courts violates the concept of federalism in the Tenth Amendment. Affirmatives will want to respond by saying that the rights being secured by the affirmative plan promote individual liberties which are guaranteed by the U. S. Constitution. The thesis of this argument is that by protecting individual liberties, e.g., the rights of free press or privacy, the affirmative is upholding the guarantees of the national constitution against possible state infringement. To support this argument, affirmatives need to study the incorporation theory embodied in the Fourteenth Amendment. The first ten amendments are generally protections guaranteed to an individual against federal government intrusion. It was not until after the Civil War that the Fourteenth Amendment was ratified — protecting individuals who are citizens of the United States against intrusions upon federal civil liberties by a state government. Consequently, if a citizen is guaranteed a right by one of the first ten amendments, the Fourteenth Amendment prohibits any state from abridging one of those rights. An example from the First Amendment will illustrate. This amendment prohibits the Congress from abridging the rights of free speech and free press. Prior to the ratification of the Fourteenth Amendment, states could abridge the freedom of speech at will. However, since a citizen of the United States cannot have First Amendment protections abridged by the national government, the Fourteenth Amendment incorporates First Amendment protections for the individual citizen against state intrusion. In summary, to answer the federalism argument, affirmative teams will argue that since the federal constitution protects all citizens, there is a justification for federal establishment of uniform rules to guarantee such protections.

CRIMINAL LAW AND CIVIL LAW

Much as the affirmative has a duty to define the terms which will be used in a debate, an author has a responsibility to define the terms used in an essay. The first of several such definitions concerns the distinction between criminal law and civil law. In order to understand the differences in depth, one would be well-advised to study a volume on legal theory. In one such volume, *The Law of the Land,* Charles Rembar begins to draw distinctions by defining the two terms. Rembar indicates that, "Criminal law has to do with relations between

the misbehaving individual and his government, civil law with relations among individuals."[4] Criminal law establishes rules of conduct which a civilized society must follow. If those rules of conduct are broken, and if the government decides to commence prosecution, and if a conviction is obtained, the individual who broke the rules may be legally punished by the government. In criminal cases, the government, acting for the people governed by that government, acts as the prosecution. This is true because, in reality, when prescribed rules of conduct are broken by an individual, society as a whole (the people) is damaged and may attempt to bring the miscreant back into the mainstream. The violation of criminal statutes often leads to punishment (usually some type of incarceration) of the individual. The government does not seek redress, because in many cases redress is not possible. By having punishment for the individual, the government seeks to deter other individuals from committing the same crime, while preventing the original offender from repeating the crime during the period of incarceration. So, criminal law involves crimes against all of society and seeks deterrence through the use or threatened use of punishment.

On the other hand, Rembar indicates that, "The civil law seeks to enforce the claims of individuals upon each other."[5] When one individual commits an act against one other individual, the second individual may decide to take legal action against the first individual. While the government decides the parameters and procedures regarding the type of action(s) that can be taken, the government does not serve as one of the parties in the dispute. The action (usually a law suit) takes place in a civil court and is adjudicated by a magistrate, but the official is there only to observe the proceedings and to make sure that rules of procedure are followed. The government does not take action against either individual because of an act committed against society. Most actions for libel are filed in civil court. If one is defamed in a newspaper or magazine, he may decide to seek monetary damages against the publication for its actions. If the magistrate agrees, the publication would be assessed monetary damages, which would then be paid to the defamed party. Usually the amount of damages is roughly equal to the extent of loss of reputation suffered by the defamed party, as determined by the judge or jury. Therefore, civil law seeks to provide a framework whereby one citizen may take action against another citizen for a wrong committed. Civil law seeks deterrence through redress (monetary damages), rather than through punishment (incarceration).

SUBSTANCE AND PROCEDURE

In order for the debater to understand this year's resolution, it is necessary to understand the difference between substantive law and procedural law. Rembar delineates the difference by saying: "Substantive law consists of the rights we are said to have and the duties we are told we must accept. Procedural law is the set of instructions prescribing how we redress a violated right, how our neglected duties are imposed."[6]

Simply put, substantive law indicates what the rules of society are. When we refer to victimless crime, driving-while-intoxicated, rape, organized crime, murder, and arson, we are referring to substantive law. Substantive law is the "what" aspect of the criminal justice system. On the other hand, procedural law indicates how society deals with justice circumstances. Right to appeal, the exclusion of illegally obtained evidence, plea bargaining, pre-trial detention, *Miranda* warnings, are examples of procedural law. Each of these refers to the process of administering justice.

This distinction is important for the debater because it will determine which direction the affirmative plan addresses. A general rule of thumb is that substantive law is left to the states, while procedural law is prescribed by the federal courts. Generally, states are left to determine what is meant by terms such as "murder" and "rape." Because procedural due process is involved, the U. S. Supreme Court may decide what evidence is admissible in murder and rape cases, and hence how the defendant's trial for murder or rape will be conducted.

The 1983-84 high school debate resolution says that the affirmative plan must establish uniform rules governing the *procedure* of all criminal courts in the nation. The central question becomes whether the affirmative team that re-defines an offense (a substantive change) is topical, since the topic requires uniform rules governing procedure. It may be argued that re-defining an offense or changing the substantive law will have an effect on the procedure for trying that crime. It therefore may be topical. Affirmatives should be forewarned, however, that the safest course to follow is to establish uniform rules in procedural law.

ADMISSIBILITY OF EVIDENCE

The first case area to be considered under the criminal courts topic concerns procedures involving the admissibility of evidence in criminal trials. In the first 100 years after the constitution was ratified, very few cases involving the admissibility of evidence were heard by the U. S. Supreme Court. In 1914, the Court ruled that evidence obtained by a U. S. Marshall in a federal case had been illegally gathered, and hence concluded that the conviction should be reversed. This case, *Weeks v. U. S.*, was based on the Fourth Amendment protection against illegal searches and seizures. However, the *Weeks* decision applied only to cases in federal court. It was not until 1961 that the U. S. Supreme Court ruled in the case of *Mapp v. Ohio* that the Fourth Amendment protections should be extended to individuals accused in state prosecutions. The *Mapp* decision was based on the incorporation clause discussed earlier. The decision in *Mapp,* known as the exclusionary rule, suggests that in all criminal prosecutions, evidence not gathered in strict adherence to search warrant procedures, is not admissible in court and cannot be used in any way against the defendant. The result of this decision has been the freeing of many felons whose lawyers proved that crucial pieces of evidence were illegally obtained.

Many affirmatives — seeking to punish the guilty and to protect society, will argue that incriminating evidence should be admissible in court proceedings regardless of how that evidence was obtained. An affirmative plan, designed to achieve this result, might be worded as follows:

I. The U.S. Supreme Court decisions in *Weeks v. U. S.*, 1914, and *Mapp v. Ohio,* 1961, shall be immediately overturned. All evidence in any criminal prosecution, regardless of how that evidence was obtained, shall be admissible in court.

II. Within each legal jurisdiction, independent review boards shall be created to oversee police behavior in relation to searches and seizures.

   A. The board will hear cases referred by judges who feel that evidence presented in cases was obtained in such a way that constituted an unreasonable search and/or seizure.

   B. The board will be empowered to impose disciplinary sanctions, i.e., withholding pay, tenure, promotion, etc. The board will not be

empowered to impose criminal sanctions.

C. The officer in question has the right to counsel, and the hearings shall be conducted in full compliance with due process protections.

The central tenet of this case concerns how to deter illegal searches and seizures. Under inherency, the affirmative team will need to show that, given current Supreme Court thinking, the states will not develop new methods for deterring illegal police tactics for gathering evidence. Steven Schlesinger argues in 1977: "Ironically, there is the other side of the coin, namely that the *Mapp* decision has largely removed from the states the incentive to deal with illegal search and seizure by other means than suppression."[7] This evidence indicates that as long as prosecutors in the states know that the evidence which is illegally obtained will be suppressed or excluded from the trial, there is no incentive for the states to seek out new methods for gathering evidence.

The first argument on significance that the affirmative will want to make is that the exclusionary rule is unjustified. James Spiotto argues that judges and scholars agree: "The increasing dissatisfaction of eminent jurists and legal scholars cannot go unheeded. Thus, given the present status of the law and the workings of the exclusionary rule, change is warranted. . . ."[8] Schlesinger contends that clinging to the rule deters a search for better methods: "A rule so contrary to reason and sound public policy is an incongruity in the American legal system that warrants examination. We must be prepared to stop clinging to a seemingly unworkable and possibly irrational rule of law when there are alternatives which may succeed in deterring police misconduct at least as well as the rule, without many of its dangerous shortcomings and side effects."[9]

The second significance argument for the affirmative is that application of the exclusionary rule lets the guilty go free. Frequently, the evidence that is suppressed is quite conclusive of the guilt of the defendant. To suppress this evidence is to deprive the prosecution of the means to convict the guilty. Professor Dallin Oaks, who has studied the effects of the exclusionary rule, contends: "Thus the application of the exclusionary rule to evidence obtained by improper search and seizure is specially vulnerable to criticism of freeing the guilty because it often excludes reliable (and often practically conclusive) evidence of guilt, and it frequently results in immediate termination of the prosecution."[10] Since the goal of the criminal justice system is to protect society by convicting those who violate society's rules, adherence to the exclusionary rule serves to defeat the goal of jurisprudence. Schlesinger corroborates this point: "Thus, the exclusionary rule results in freeing of many suspects whose cases contain probative evidence clearly pointing to guilt, or results in a new trial of these suspects in which significant, if not crucial, evidence may not be admitted."[11]

The third significance argument lodged by the affirmative is that the exclusionary rule fails to deter police misconduct. In theory, if the police know that illegally obtained evidence will be suppressed at trial, then the rule should provide some level of deterrence in preventing police abuse or negligence. Unfortunately, this is not the case. Schlesinger points out: "Since the deterrence of police behavior is a major justification offered for the rule, these statistics cast doubt on the success of the rule as a deterrent."[12] Spiotto provides the empirical evidence to support Schlesinger's contention: "An empirical study indicated that over a 20-year period in Chicago, the proportional number of motions to suppress evidence allegedly obtained illegally increased significantly. This is the opposite result of what would be expected if the rule had been efficacious in

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deterring police misconduct."[13] Professor Oaks continues: ". . . there is hardly any evidence that the rule exerts any deterrent effect on the small fraction of law enforcement activity that is aimed at prosecution."[14] Supporters of the exclusionary rule hope that the standard will have some educational effect on police, but Peterson contends that the effect is minimal at best: "The disciplinary or educational effect of the court releasing the defendant for police misbehavior is so indirect as to be no more than a mild deterrent at best."[15] Professor Oaks summarizes: "As a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure."[16]

Finally, the affirmative would want to show that adoption of the plan would decrease the harm. Of course it is obvious that overturning the *Mapp* and *Weeks* decisions would permit all evidence, regardless of how it was obtained, to be introduced in the trial. Therefore, the affirmative could claim that the evidence which would convict the defendant would be used by prosecutors to do so. In addition, affirmatives might want to claim that the review boards established in the plan would serve as a deterrent to police misconduct. Schlesinger agrees when he says: ". . . to some extent, a substantial number of proceedings before independent review boards and numerous civil actions — a reasonable proportion of them successful for the complainant — would be indicative of success."[17]

PLEA BARGAINING

The second case area to be considered in the affirmative analysis section concerns plea bargaining. Most people have a "civics book" view of what happens in the criminal justice system. Many believe that when a suspect is arrested, he is arraigned before a magistrate after being charged by a grand jury, that he usually pleads not guilty, and that a trial takes place to determine guilt or innocence. While on some occasions this scenario is true, in the vast majority of cases the suspect never has a trial because he agrees to plead guilty to a lesser charge (and hence, lesser punishment), and is either sent away to prison or serves a probationary term. This process is efficient, but does not result in felons being punished according to the severity of the crime committed. Many affirmative teams will try to remedy this situation by substantially revising (or in some cases, eliminating) the plea bargaining arrangement.

Actually, there are two different plans that could be run under a plea bargaining affirmative. The mandates of the first plan might read as follows:

> In all cases involving a suspect charged with a felony offense, no plea bargaining will be permitted. Once the prosecutor has announced that a certain charge has been levied against a defendant, that charge may not be reduced to a lesser charge in return for a plea of guilty.

The inherency for a plea bargaining affirmative is based on the desire by prosecutors to finish a case (hence clearing the docket) as quickly as possible. Since most district attorneys in the United States are elected by the people, those district attorneys like to be able to claim, during re-election, that a large number of the cases tried by their office resulted in convictions. Since a plea bargain results in a guilty plea by the defendant, prosecutors are able to claim these cases as convictions. Dr. Rohrer indicates the number of cases involved in the plea bargain process: "Indeed, the vast majority of criminal convictions are obtained without a trial. Roughly 90% of all criminal cases are resolved without trial by a guilty plea."[18] This piece of evidence indicates that of all criminal

charges le ied in the entire nation, approximately 90% involve plea bargaining. This sta[illegible]ic should serve to dispe[illegible]the notion that all (or most) defendants go to trial.

The problem with this practice is that it denies the defendant his due process guarantees to have his guilt determined by a jury of his peers. Therefore, the first significance claim should be that plea bargaining denies due process protections. Dr. Levine questions the fairness of the practice when he says: "Unquestionably, due process suffers from plea bargaining. Defendants are deprived of their 'day in court,' and the informal, often clandestine dealings between lawyers seem anything but fair in many cases."[19] Indeed, many times a defendant may be unsure of his legal standing and may agree to a plea bargain under duress, as Rohrer points out: ". . . the offer of leniency in exchange for a guilty plea constitutes coercion."[20] If the defendant is coerced, there is great doubt as to whether the criminal justice system is meeting its goals.

A second significance claim for the affirmative is that plea bargaining results in inaccurate convictions and/or sentences. First, in most cases, the prosecutors have a great advantage over the defendant. Dr. Levine gives the example of overcharging: "Prosecutors sometimes institute, at the outset, more charges than are warranted by the evidence so that they have flexibility in negotiating with the defendant. This practice, called 'overcharging' often plays a key role in obtaining the defendant's cooperation, because it makes the defendant vulnerable to disastrous consequences should he or she opt for a trial and lose."[21] Even if the prosecutor does not create additional charges, he might decide to charge the defendant with a more serious single charge. Rohrer indicates that this empirically occurs: "A recent study found that prosecutors occasionally charge a more serious offense than is supported by the evidence in order to gain a more favorable bargaining position."[22] Rohrer goes on to show how this practice affects the sentence: "Failure to seek such a bargain, whether through ignorance, apathy, or intimidation, permits the defendant to be convicted of a more serious offense and receive a more serious sentence than is deemed just by society."[23]

Second, plea bargaining forces innocent people to plead guilty. Levine describes by saying: "Indeed, the pressures on defendants to yield to this process and forsake trials occasionally result in totally innocent people pleading guilty in order to avoid the risk of being wrongfully convicted and severely punished."[24] This fear of being punished severely is a very real fear for the innocent suspect. The extent of the fear is shown by Rohrer: "The first and most obvious danger arising from these pressures [to plead guilty] is the possibility of inaccurate pleas. Faced with the threat of years of additional imprisonment or even death, a defendant who acts out of fear may even plead guilty to a crime he did not commit, or to a charge more serious than is warranted by the facts."[25] Of course, it is possible that even if the defendant went to trial, he could be found incorrectly guilty. However, the possibility of this happening is significantly less than with the plea bargain. Rohrer notes: "It might be argued in defense of this system that innocent defendants are occasionally convicted even in a trial. While that is a possibility, the danger is far greater in the plea process."[26]

Third, not only are the innocent convicted, but also the guilty get off with lighter sentences than they should. One of the goals of the criminal justice system is to remove criminal elements from society for a certain length of time. Levine shows how the plea process affects this goal: "Such sentences [less harsh as a result of plea bargaining] undermine incapacitation, the exclusion of criminals from society, in that many criminals are able to bargain for their

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immediate freedom or for a very short prison term, so they can very quickly continue their life of crime if they desire."[27] Levine goes on to show how this works in New York: "Another New York study showed that eight out of every ten persons accused of homicide in 1973 pleaded guilty to a lesser charge and received either probation or no more than ten years imprisonment."[28]

Fourth, the process happens so quickly that the defendant is frequently not totally aware of the implications of his acts. Professor Newman explains: "Offenders often claim that they did not know what they were doing, what was happening to them, or that so much officialdom was stacked against them that their voice was never heard and their side of the story never understood."[29]

The final significance argument concerns public respect for the system itself. Since people see guilty felons receiving light sentences and innocent persons going to prison, it is no wonder that the public begins to lose faith in the system. Robert Walker describes this phenomenon: ". . . the reckless use of that process [plea bargaining] has led to the complete condemning of the criminal . . . system, a loss of confidence by the police, the community, and especially the victim in the ability of the court system to maintain an orderly society."[30]

In solvency, the affirmative will want to show two things. First, the affirmative can argue that abolishing plea bargaining will not decrease guilty pleas. Rohrer says: "As indicated earlier, there is no evidence that the number of guilty pleas would be substantially reduced without [plea] bargaining."[31] The second solvency argument for this plan is simply that more money for the courts will solve the harms. Rohrer concludes: ". . . as the *Harvard Law Review* recently noted, 'much of the harm threatened by the abolition of plea bargaining can be avoided by providing the additional resources necessary for more trials.'"[32]

A second way to run a plea bargaining case is to formalize the system, so that adequate checks on abuse can be included. Such a plan might read:

1. All plea bargaining must follow a formalized, structured process, as determined by the board.
2. All bargaining sessions must be attended by not only a defense attorney, but also a court officer (other than the judge who will try the case), and a stenographer to take records of the entire proceedings.
3. The prosecution must present all evidence it intends to present at the trial so that the defendant and his attorney are aware of the strength of the case against him.

The inherency and significance for this plan will be the same as for the plan which abolishes plea bargaining altogether. However, under solvency, the affirmative will want to argue that the problem of defendant ignorance will be alleviated. Rohrer agrees by saying: "The correctional problems that are practiced would be alleviated by a procedure in which the defendant's position was clearly explained to him and to his attorney by an officer of the court. And the very presence of the attorney and the court officer, plus the knowledge that a record is being kept, would deter prosecutors from subjecting defendants to overly harsh pressures."[33]

FIRST AND SIXTH AMENDMENT RIGHTS

The third affirmative case area to be considered is one of the most controversial topics in the area of criminal justice. This case area, prejudicial publicity, involves an attempt to balance two constitutional rights — the right of a free press guaranteed by the First Amendment and the right to a fair trial promised

by the Sixth Amendment. Currently, the laws that govern whether the press media may report (and in some cases televise) the proceedings of a trial are fragmented, to say the least. Some jurisdictions allow total press coverage, while others severely restrict the press. There are several U. S. Supreme Court rulings in this area, but not one of them provides absolute and unrestricted rights for the press to report on the proceedings in a criminal trial. Many affirmatives on the 1983-84 high school debate resolution might decide to codify the laws and provide uniform rules governing the procedure of the press in criminal trials.

Actually, there are two possible plans that could be run within this case area, each one seeking to guarantee a constitutional right. For reference purposes, the two rights being sought may be found in the First and Sixth Amendments to the U. S. Constitution. In part, the First Amendment states: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[4] The Sixth Amendment promises that, "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . . ."[5] The first of the two plans seeks to guarantee the First Amendment protections to the press. The mandates of that plan should state:

1. In all criminal trials in the United States, the press shall be guaranteed access to the courtroom.
2. All electronic equipment used by the press in the courtroom during trial shall conform to non-discriminatory "place and manner" regulations of the district wherein the trial shall be conducted.
3. Judicial restrict orders (gag orders) on the press by the presiding judge shall be considered null and void.
4. Judges shall admonish jurors in all criminal trials to disregard extra-judicial evidence in reaching a verdict.

Under inherency, the first claim the affirmative will want to make is that Court guidelines fail to provide clear standards. In a study of prejudicial publicity cases presented before the U. S. Supreme Court, John Gossett noted that, "How these two values [free press and fair trial] should be balanced when they conflict is a question that remains unanswered [by the Supreme Court]."[6] The result is that the rights of both sides are expanded or restricted, depending on the make-up of the Court. Dr. Gossett continues: "There is no hierarchy of rights that inherently emerges from the Constitution. Instead, the Supreme Court believes that rights promised by the Constitution are subject to interpretation and may be restricted or expanded depending on the time and circumstance of a particular case. Even among members of the Court, who must eventually decide the relative value of a right, there is considerable disagreement about how the rights are to be balanced."[7]

The second inherency argument on prejudicial publicity is that trial judges always favor defendant rights over press rights. This is true primarily because judges have been trained to respect defendant rights, and because they seek a fair trial as the paramount goal in administering justice. In fact, many judges, as Gossett points out, ". . . contend . . . that an absolutely unrestrained press may abuse the rights of a defendant in a criminal proceeding."[8] Judges fear that the jury, after reading and/or hearing media reports of the trial, will base a verdict on the information presented in the press, rather than the information presented in the trial. This type of evidence is referred to as "extra-judicial

evidence," because it has not been subjected to the rules of evidence used in the courtroom. This becomes an even more complex problem when one considers that the persons probably best qualified to sift through long and complex testimony, the concerned and well-educated, are those persons most likely to have read about and possibly formed an opinion based on their readings. If such is true, there may be serious obstacles to ever being able to impanel a qualified, yet impartial, jury.

The central claim by affirmative teams offering significance is that the present system denies freedom of the press. This claim is based on two maxims. First, the First Amendment is an absolute guarantee. In reading the amendment, it is quite apparent that there are no qualifying words in the context. It says that Congress shall make *no* law, not some laws, nor few laws, nor laws in some circumstances, but no law, period. It is difficult to see how the phrase "no law" can be interpreted any other way. While the Court has interpreted this phrase in different ways, it should be noted that the founding fathers must have meant, at least, that this amendment is a paramount value.

The second maxim related to significance is that an unrestricted press is essential for representative government. This position rests on three vital functions performed by the press in America. First, a free press protects the public's right to know. The press expresses itself not only for profit, but to insure that the citizens are informed regarding legitimate concerns. Extensive press coverage of government actions often exposes corruption, inefficiency, and prejudice practiced by government officials. This coverage may aid in the fair and effective administration of justice. The press protects the public's right to know by enhancing law enforcement. Newspapers that cover the courthouse often place pressure on unwilling law enforcement officers to solve crimes that might have remained unsolved. During the period of extensive civil rights demonstrations, the demands by newspapers in the South and North forced reluctant authorities to act. In performing this function, the press serves as the agent of the public. Justice Lewis Powell wrote in 1974: "[The press] is the means by which the people receive that free flow of information and ideas essential to intelligent self-government. By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment."[39]

The second vital function is that the press is not afraid to cover difficult stories. Many local examples demonstrate that the press is very courageous in the way it investigates a story. Many judges and city officials are keenly aware that the press serves as the watchdog of the public. Coverage of the Watergate episode, which eventually caused the collapse of the Nixon White House, illustrates the persistence of the press. *Washington Post* reporter, Bob Woodward, indicates the need for a diligent press capable of asking difficult questions.[40] Criticism of the press by government officials is often indicative of the diligence by the media. Columnist George F. Will notes, "If the politicians are unhappy, that is proof that a vigilant and fearless press has discomfited some presumed rascals."[41]

Third, a free press insures better trials. Professor James Wiggins argues many advantages of having press coverage of trials. Among them, he notes that judges are more conscious of public duty, citizens become aware of the judicial process, judges and court officers are protected from false accusations of wrongdoing, and that potential criminals are discouraged from committing similar offenses. In insuring better trials, public scrutiny enhances fairness. In the

Nebraska Press, the Supreme Court observed: "With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice."[42]

Regarding solvency, there are three claims that the affirmative will need to make. First, the plan guarantees a free press. It should be obvious that if the press is currently excluded from some trials, that the plan, by guaranteeing access, enhances the free press provisions of the First Amendment. Second, the plan will also provide for a fair trial. Since the plan calls for a public trial, the defendant can be assured that any abuses not deterred by the presence of the press, will be reported in the press and available for review upon appeal. Finally, the affirmative should claim that the judicial instructions to the jury are effective in eliminating extra-judicial evidence.

In 1966, Rita Simon conducted a study on the effects of newspaper stories on a jury. Simon's study attempted to assess the impact of prejudicial stories printed in a newspaper while the trial progressed. Ninety-seven subjects participated in the study. At the conclusion of the mock trial, 67 percent of those who read the sensational newspaper coverage believed the mock defendant to be guilty. After voting without deliberation, the jury received instructions from a mock judge directing the jury to disregard statements made outside the courtroom. After receiving the instructions, only 25 percent of the jurors voted to convict the defendant. The major finding of the Simon Study is that a jury can overcome the effects of sensationalism by adhering to the judge-delivered instructions. In this case, the members of the jury were able to distinguish between in-court testimony and out-of-court statements by the press. The jury disregarded the extra-judicial evidence.

Another way of running a prejudicial publicity case is almost the exact opposite of the first way. Using this approach, affirmative teams will claim that currently, the press is permitted to attend most trials, and that this permission denies the rights of the defendant to a fair trial. The plan might read:

1. In all criminal cases in the United States, prior to the start of the trial, the press shall only be able to print that a crime has been committed and that a suspect has been arrested.
2. During the trial of that suspect, the press shall not be permitted to report on the courtroom proceedings.
3. At the conclusion of the trial, all restrictions on the press applied as a result of this plan shall be lifted.

For inherency, the affirmative should have no trouble demonstrating that the press covers most trials currently. In 1976, the Supreme Court ruled in the case of *Nebraska Press Association v. Stuart* that to deny the press total access would be unconstitutional. In a concurring opinion to that case, Justice William Brennan, joined by Justices Stewart and Marshall, argued: "[T]he press may be arrogant, tyrannical, abusive and sensationalist . . . But the decision of what, when, and how to publish is for editors, not judges."[43] Thus, the inherency should be fairly strong in indicating that the press' right to attend trials is guaranteed.

On significance, the affirmative will want to make two claims. First, the present system denies the defendant a fair trial. Public trials are conducted in this nation to preclude the type of treatment received by defendants in the Star Chamber in Britain. What constitutes a public trial, though, is in doubt. Lawyers and judges often claim that a public trial is a right *enjoyed* by the

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defendant. Their argument is that the public has no constitutional right to attend a trial, for the defendant may waive the right. Such arguments are usually based on a statement by Judge Thomas M. Cooley. In his *Treatise of Constitutional Limitations,* Cooley wrote:

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with, and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused and who would be drawn hither by prurient curiosity are excluded altogether.[44]

Therefore, if a trial is conducted for the benefit of the accused only, then if that defendant feels that the press may hurt his case, he should be able to see that the press is excluded.

In some cases, the press does abuse the defendant. Some years ago, Billie Sol Estes, a west Texas businessman, was indicted by a grand jury for swindling. The case obtained national notoriety; the press clippings alone filled eleven volumes. The pre-trial hearings were broadcast live on radio and television, and news photography was permitted. Twelve cameramen filmed the hearings. Mr. Estes appealed to the Supreme Court to reverse his conviction based on an unfair trial created by the presence of the media. In his opinion, Justice Tom Clark noted:

> The television camera is a powerful weapon. Intentionally or inadvertently it can destroy an accused and his case in the eyes of the public. While our telecasters are honorable men, they too are human. . . . A defendant on trial for a specific crime is entitled to his day in court, not in a stadium, or a city or nationwide arena. The heightened public clamor resulting from radio and television coverage will inevitably result in prejudice.[45]

This, as well as other cases, demonstrates that the press can deny a fair trial.

The second significance claim is that having the press at trials disrupts justice. One of the functions of the judiciary is to protect the decorum of the courtroom. Judicial proceedings must not be conducted in a carnival atmosphere. Justice Black noted that, "The very purpose of a court system is to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures."[46] Judges must be able to protect the calm nature of the proceedings in order to guarantee the defendant a fair trial. The Supreme Court recognizes the need to prevent disorder in the courtroom.

Under solvency, the affirmative will want to claim that if the press cannot report on the activities in the courtroom while the trial is in progress, it will be impossible to influence the jury adversely. The affirmative will also want to argue that the public will still be able to know about trials, but only after the proceedings are over. In the *Estes* case, Justice Clark noted that a free press was important. However, he indicated, the freedom to report the news must be subjected to the maintenance of absolute fairness in the courtroom. He noted that television cameras are not part of the right to keep the public informed.

The prejudicial publicity cases are but two examples of how values can be debated on a policy proposition. Certainly, free press and fair trial are two of the most important values in our free society. While we may be able to point out specific examples of abuse of each of these rights, the number of examples are really not that important. The important aspect is that whenever it is possible through the formulation of public policy to enhance constitutional values, we should strive to do so.

DEATH PENALTY

The next affirmative case area concerns the use of the death penalty as punishment for crimes committed. Although the reason for using the death penalty has varied over the years, the practice of using it has remained fairly constant. At different points in our history, society has held up two goals for dealing with convicted criminals: punishment and rehabilitation. While in several instances these two goals are contradictory, society clings to the benefits it perceives is attained by each goal. Quite clearly, the use of the death penalty as a punishment falls into the first category, punishment. Many Americans, since the beginning of our republic, have subscribed to the Judeo-Christian notion of "an eye for an eye," which means that punishment for an act which violates the norms of society should be roughly equal to the harm contained in the act committed. In the criminal justice context, many persons believe that if a convicted felon has killed a person, then the life of that felon should be terminated as well. In a more pragmatic sense, legislators at both the national and state levels support capital punishment because it shows that they are "tough on criminals," a stance which garners votes at election time.

In a real sense, however, the death penalty is a unique creation. Because it kills a person, it is not reversible. Consequently, the death penalty runs counter to the goal of rehabilitation, because rehabilitating a person is impossible if that person is not alive. Since our criminal justice system is not perfect, and since it occasionally frees the guilty or convicts the innocent, the death penalty should be abolished because its use precludes the correcting of mistakes at a later date. Therefore, many affirmative teams may argue that the death penalty should be abolished. The following is a sample plan for such a case:

> In all criminal cases in the United States, the use of capital punishment upon conviction shall be declared cruel and unusual punishment, and prohibited under the auspices of the Eighth Amendment to the U. S. Constitution.

Under inherency, affirmative teams will want to claim that most states are attitudinally inclined to permit capital punishment. George Merry, writing in the *Christian Science Monitor,* notes that, "Today, all but fourteen of the fifty states have capital punishment laws on their books. The nation's death row population is nearing 1,000."[47] While not many convicts have been executed in recent years, the existence of the penalty as an option still remains. Dr. Rohrer argued: "While the incidence of execution has been declining dramatically, capital punishment is not likely to be abolished, mainly because of attitudinal and political factors."[48] Although there have been fewer than five executions in the past eight years, most states are rewriting their statutes in order to abide by recent Supreme Court decisions.

On the issue of significance, affirmative teams will want to claim that the death penalty is unjustified. Three specific arguments support the claim that it is unjustified. First, capital punishment is morally wrong. In a nation that prides itself on its civility, it seems inconceivable that the government would kill its own citizens, regardless of the crime. Rohrer notes that the penalty constitutes murder: "A nation civilized enough to outlaw child labor and to give aid to its poor still resorts to a form of legal murder."[49] In addition, the practice is condemned by the international community. Melvin Maddocks illustrates: "Amnesty International has added capital punishment to its catalogue of crimes

against human rights."[50] Furthermore, many have argued that the existence of capital punishment violates the commands of the Eighth Amendment regarding cruel and unusual punishment.

The second argument supporting the significance claim is that the death penalty is discriminatory. For whatever reason, most of the persons executed under the capital punishment statutes are members of the disadvantaged class of people. George Merry writes: "Capital punishment critics maintain that the death penalty is 'inhumane' and the process by which it is imposed is 'discriminatory' with the poor and members of minority groups particularly at a disadvantage."[51] Charles Black puts it very succinctly, "Most people on death row are black, and almost all are poor."[52] These statistics tend to indicate that the application of the penalty is arbitrary. Rohrer contends that: "Thus the structures permit more or less arbitrary application of the death penalty and the prejudices of juries guarantee that this power can be used in a discriminatory fashion."[53] The blacks seem to be at a particular disadvantage, as Rohrer goes on to point out: "Of all those executed since 1930, 53.5% were black."[54] Although there are no accurate statistics to suggest why juries act the way they do, there seems to be something in the system which perpetuates the discrimination. Rohrer concludes: "Again, statistics and examples are not perfect proof; they cannot determine which juries invoked the death penalty because the defendants were blacks. However, the statistics seem to indicate that something is very wrong, that the system encourages prejudice."[55]

The third, and possibly most telling, claim under significance is that the death penalty could result in the death of an innocent person. Merry argues that, "All executions, by whatever means, critics contend, constitute 'cruel and unusual punishment' which cannot be reversed should it later be proved that the convicted murderer was innocent."[56] Dan Rohrer demonstrates the possible fallacy in the system: "Although we try to minimize the number of our judicial mistakes, we are fallible and will inevitably convict some innocent men."[57] He goes on to point out that the ability to reverse a punishment should be an integral part of the system: "All punishment, however, except the death penalty, allows for reversal when error is found, and since error is inherent to the system, reversibility should be an essential feature of all forms of punishment."[58] Finally, the lack of logic in the system is shown by Rohrer, when he summarizes: "It is illogical and tragic to make the most severe punishment the system is capable of so permanent and irreversible."[59] Because juries are human and capable of error, we should not make the punishment decreed by juries irreversible.

Under solvency, affirmatives will want to claim that the threat of capital punishment is not a deterrent to murder, and that murder rates will not be effected by abolishing the option of applying the death penalty. One study states: "Considerable evidence exists that a great percentage of those who commit violent crimes are likely to be suffering from some form of mental illness or have acted in a fit of passion. Therefore, they are undeterrable and it is pointless to threaten such offenders with death."[60] This finding has been confirmed in state-to-state studies. The House of Representatives Committee on the Judiciary noted: "First, studies of the homicide rates in contiguous jurisdictions with and without the death penalty show that both states with and without the death penalty show virtually identical murder rates and trends."[61] That study goes on to point out: "Second, those studies conducted to determine if the homicide rate in a given jurisdiction increases with the abolition of the death penalty and

decreases with its restoration show that there is not correlation between the status of the death penalty and the homocide rate."[62] Virtually the only reason for keeping the punishment would be to protect police and prison guards. However, statistics show that there is no difference in this protection between states with the death penalty and those states without the death penalty. The Judiciary Committee concludes: ". . . studies to determine if law enforcement and prison personnel are afforded greater protection by the death penalty show that police and prison homicides are virtually the same in abolition states as in death penalty states."[63] Consequently, because it does not deter crime and because it is morally unjustified, many affirmatives will claim that the death penalty should be eliminated as an option in the criminal justice system's sentencing phase.

At the opposite end of the spectrum is another case area dealing with the death penalty. As mentioned earlier, society wants a safe environment, and many believe that the best way to guarantee that safety is by eliminating those elements of society that cannot (or refuse to) conform to the norms of society. This segment of the population contends that, as a goal of the criminal justice system, rehabilitation is largely ineffective and counterproductive for many convicted felons. Consequently, this group maintains that for some crimes, the death penalty should be mandatory. The mandates for a sample plan in this area would be worded as follows:

1. In all criminal prosecutions for first degree, premeditated murder, and in all criminal prosecutions for the killing of a public official, a verdict of guilty shall result in an automatic, non-negotiable sentence of death, in a manner prescribed by the jurisdiction wherein the crime shall have been committed.
2. Within 30 days of a guilty verdict in a prosecution described in plank one, the highest appeals court of the jurisdiction shall review the record of the case for error. Standing and certiorari shall be guaranteed.
3. Upon a holding affirming the conviction by the highest appeals court of the jurisdiction, the defendant shall be executed within a period not to exceed 48 hours. If the court reverses the conviction, a new trial shall be granted, and that trial shall be conducted in a manner not inconsistent with the provisions of this legislation.
4. No preliminary injunctive relief shall be allowed.

The inherency of this case is based on the assumption that the death penalty is applied sporadically, inconsistently, and only in certain states. One of the criticisms of the death penalty has been that it fails to achieve deterrence because there is no certainty of its being used, even when the jury specifies it as the punishment in a criminal prosecution. What happens in practice is that the lawyers for the convict pursue numerous and lengthy appeals, and nothing happens while the appeals are in process. Since the judicial system moves at a very slow pace, often inmates on death row remain there for ten or so years while all possible avenues for appeal are exhausted. Consequently, there is no certainty that the penalty will ever be carried out. In addition, there is the problem of lack of speed. One of the assumptions of the criminal justice system is that, in order for a punishment to have any deterrent effect, the inmate must be aware that punishment will be swift. In this case, the maxim that "justice delayed is justice denied" takes on some importance and relevance. The theory is that if a convict is forced to wait years before receiving punishment, he will not be deterred (and others like him will not be deterred) from commission of an antisocial act.

The first significance argument is that society has a right to see the death penalty imposed. When an individual commits an act which violates the societal norms, some will argue that society has a right to vent its moral outrage. The Supreme Court noted in *Gregg v. Georgia:* "In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs."[64] James Kilpatrick notes that society has the right to use the death penalty: "Imposition of the death sentence in a narrow class of serious crimes is both morally defensible and constitutionally permissible."[65]

The second significance argument is that without the death penalty there will be more murders. In other words, the death sentence is a deterrent to murder. Ernest van den Haag, who has studied many aspects of the system, contends: "At present, 'life imprisonment' means anything from six months — after which the parole board in Florida can release the man — to twelve years in some states. But even if it were real life imprisonment, its deterrent effect will never be as great as that of the death penalty."[66] Levine reports a similar finding on the basis of the Erlich study: "Erlich concluded that had there been one additional execution per year between 1935 and 1969, seven or eight fewer murders would have occurred each year."[67] Levine goes on to provide some support for the Erlich findings: "To support his [Erlich's] statistical evidence, Erlich argued that even murderers who are emotional make self-serving choices, and they consider the degree to which acting out their feelings might lead to the loss of their own life as a punishment."[68] The theory is explained by Levine in 1980: "The theory behind capital punishment as a deterrent is straightforward. Death represents the ultimate punishment, it is a fate that conflicts with the human instinct for survival and it is thus feared even by the most downtrodden."[69] Therefore, if murderers do, in fact, consider the consequences of their act prior to commission, then the death penalty would serve to decrease the number of murders committed.

Under solvency, affirmatives using this approach will want to claim that death works as a deterrence. James Kilpatrick notes: "If a bank robber knew, before he pulled a trigger and killed a teller, that on conviction his own life would be taken in retribution, the deterrent might well be effective."[70] Van den Haag supports this conclusion: "The death penalty is the only actually irrevocable penalty. Because of that, it is the one that people fear most. And because it is feared most, it is the one that is most likely to deter."[71] Finally, the Supreme Court weighs this sentence compared to other alternatives: ". . . for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act. And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate."[72] In conclusion, if the penalty is guaranteed and speedy, then there is a greater likelihood that the criminal will pause (and possibly refrain) before taking the life of another individual.

NOTES

[1]For a discussion of these issues, see Michael Pfau, "The Present System Revisited Part One: Incremental Change," *Journal of the American Forensic Association,* 17 (Fall 1980), pp. 80-84.

[2]James P. Levine, et al., *Criminal Justice: A Public Policy Approach,* (New York: Harcourt

Brace Jovanovich, 1980), p. 121.
[3]Amendment X, United States Constitution.
[4]Charles Rembar, *The Law of the Land: The Evolution of Our Legal System* (New York: Simon and Schuster, 1980), p. 37.
[5]Rembar, p. 38.
[6]Rembar, p. 77.
[7]Steven Schlesinger, *Exclusionary Injustice*, 1977, p. 85.
[8]James Spiotto, "The Search and Seizure Problem," *Journal of Police Science and Administration*, 1973, p. 49.
[9]Schlesinger, p. 5.
[10]Dallin Oaks, "Studying the Exclusionary Rule in Search and Seizure," *University of Chicago Law Review*, 1970, p. 738.
[11]Schlesinger, p. 3.
[12]Schlesinger, p. 3.
[13]Spiotto, p. 36.
[14]Oaks, p. 755.
[15]Virgil Peterson, "Restrictions in the Law of Search and Seizure," *Northwestern University Law Review*, 1958, p. 52.
[16]Oaks, p. 755.
[17]Schlesinger, p. 85.
[18]Daniel Rohrer, *Justice Before the Law*, 1971, p. 179.
[19]Levine, p. 227.
[20]Rohrer, p. 189.
[21]Levine, p. 207.
[22]Rohrer, p. 180.
[23]Rohrer, p. 184.
[24]Levine, p. 227.
[25]Rohrer, p. 184.
[26]Rohrer, p. 185.
[27]Levine, p. 226.
[28]Levine, p. 214.
[29]Newman, in Rohrer, p. 188.
[30]Walker, in Thomas Church, Jr., "Plea Bargains: Concessions and the Courts," *Law and Society Review*, Spring 1976, p. 380.
[31]Rohrer, p. 193.
[32]Rohrer, p. 193.
[33]Rohrer, p. 192.
[34]Amendment I, United States Constitution.
[35]Amendment VI, United States Constitution.
[36]John S. Gossett, *The Role of the Clear and Present Danger Doctrine in Prejudicial Publicity Cases Before the U. S. Supreme Court: 1941-1976*, Dissertation, University of Southern California, 1980, p. 2.
[37]Gossett, pp. 2-3.
[38]Gossett, p. 4.
[39]Quoted in Gossett, p. 109.
[40]See Gossett, p. 109.
[41]Quoted in Gossett, p. 109.
[42]*Nebraska Press Association v. Stuart*, 427 US 539 (1976).
[43]*Nebraska Press*, 539.
[44]Cooley, in Gossett, p. 92.
[45]*Estes v. Texas*, 381 US 532 (1965).
[46]Gossett, p. 94.
[47]*Christian Science Monitor*, March 5, 1982, p. 14.
[48]Rohrer, p. 176.
[49]Rohrer, p. 167.
[50]*Christian Science Monitor*, March 4, 1982, p. 22.
[51]*Christian Science Monitor*, March 5, 1982, p. 14.
[52]*Christian Science Monitor*, March 4, 1982, p. 22.
[53]Rohrer, p. 174.
[54]Rohrer, p. 173.
[55]Rohrer, p. 173.
[56]*Christian Science Monitor*, March 5, 1982, p. 14.
[57]Rohrer, p. 172.

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[58]Rohrer, p. 172.
[59]Rohrer, p. 172.
[60]Working Papers of the National Commission on the Reform of Federal Criminal Laws, October 1968, p. 26.
[61]Hearings before the Committee on the Judiciary of the United States House of Representatives, "Capital Punishment," March 1972, p. 23.
[62]House Hearings, p. 23.
[63]House Hearings, p. 23.
[64]*Gregg v. Georgia*, 96 SCt 2909, 2930 (1976).
[65]*Nations Business*, April, 1975, p. 7.
[66]*U. S. News and World Report*, April 19, 1976, p. 37.
[67]Levine, p. 392.
[68]Levine, p. 392.
[69]Levine, p. 390.
[70]*Nations Business*, p. 7.
[71]*U. S. News and World Report*, April 19, 1976, p. 37.
[72]*Gregg v. Georgia*, at 2931.

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CHAPTER 3

NEGATIVE ANALYSIS AND CASE IDEAS

INTRODUCTION

The 1983-84 high school debate topic poses many problems for the negative team. Given the broad scope of all three topics, the negative debater must be prepared for a wide variety of cases. In addition, the nature of the current topic requires that the negative debater keep informed about new developments in the law. The American Bar Association, for example, will prepare a revision of its ethics code this summer. The Supreme Court has agreed to hear a new case on the exclusionary rule that could drastically modify the nature of the rule. Finally, the entire nature of the judicial system is such that a change in one part of the system could alter another part of the system. A policy that increased convictions could increase prison overcrowding and thus change our parole system. A policy that altered the exclusionary rule could alter police procedures.

Because the parts of the judicial system are interrelated, it is important for any negative debater to understand all parts of the criminal and civil system, even if the debater will be debating only one part of the system.[1] Thus, while this essay will address the three major topics being debated, a wise debater will read all three sections, not just the section being debated by that individual. This is true for several reasons. First, while some issues apply to several topics, for the sake of convenience they will be discussed in only one section of this essay. For example, cases suggesting a modification of the jury system could be argued on either the civil or criminal justice topics; these cases will be treated in the section on civil justice.

It is also vital for a negative debater to understand the entire judicial process in order to effectively argue against any changes in that system. One desirable strategy for a negative team is to attempt to understand both the structure of the current judicial system and the philosophy behind that system. This would permit the negative team to tie its arguments to a clearly definable value system and it would thus increase the persuasive appeal of the negative team. By understanding why the system is organized the way that it is, negative teams may more effectively defend the current way of administering the judicial system. This strategy can only be effective if a negative debater knows not only the philosophy behind the practices being modified, but also the philosophy behind other parts of the judicial system — and how these philosophies relate to each other. This knowledge will allow the debater to see the effects of various modifications of the system on other parts of the system. It will also permit the debater to develop a strong defense of the way the system works. Thus, while this essay is divided into the three areas covered by the proposed topics, material on any given topic can be found in all three sections.

Resolved: **That the United States should adopt uniform rules governing the criminal investigation procedure of all public law enforcement agencies in the nation.**

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Weighing Law and Order Against Individual Liberty

The first topic addresses the problem of gathering information on individuals accused of committing a crime. *At the heart of this topic is one of the most fundamental value conflicts in our society: the conflict between law and order and individual liberty.* The affirmative team will, in most cases, be arguing for the importance of law and order. One of the most basic needs of human beings is to be secure; the increase in crime deprives us of this security. Crime is obviously thought to be an evil that needs to be remedied. In order to achieve this goal, citizens need to give police more power. The desire to reduce crime and to promote security is a strong one.

On the other hand, the desire to increase security comes into conflict with a second value: the value of human dignity. When more power is given to the police to combat crime, less power is reserved for the individual. While society as a whole may be safer, this safety comes at the expense of many individuals in the society. The powers many affirmative teams attempt to give to the police may destroy some of the most basic rights of individuals. Wiretapping, for example, invades the privacy of those that have their lines tapped, and the right to privacy has been regarded by many individuals, e.g., the late Justice Brandeis, as one of the rights most cherished by civilized men. Search and seizure violates the sanctity of the house. In all of these cases, the desire to promote law and order has violated the individual privacy of the victim of the police action.

The issue becomes: How can a negative team convince the judge that the value of the individual is more important than the value of law and order? A wise negative may approach this problem in two directions.[2]

First, the negative team should minimize the importance of the value of law and order in the immediate case. This can be done in several ways. It may be desirable to attempt to prove that the problem of crime is not as serious as the affirmative would lead the judge to believe. This would suggest that the current level of law and order is adequate. This could be combined with a strategy that suggests that the advantages to be gained by increasing the power of police would be minimal. For example, many teams will assume that the more individuals that are arrested, the lower the rate of crime will be. This is based upon a concept known as deterrence. Essentially, deterrence suggests that if an individual is punished, that punishment will act to deter future criminals. Thus, any policy that results in more arrests and convictions will increase the security of individuals. This position makes the assumption that there is a relationship between an arrest and the incentive for individuals to commit a crime. The evidence on this is inconclusive,[3] and a wise negative team should research this issue. If there is no relationship between arrests and the crime rate, there would be no harm to taking away power from the police, since the value of law and order would not be promoted by increasing the arrest rate.[4] The literature on deterrence would suggest that the certainty of an *arrest* may deter crime, while the certainty of punishment and the severity of punishment may not have a significant effect on crime. If a negative team could establish that the affirmative policy would have no effect on the crime rate, they would undermine the appeal of the value of law and order.

Even if law and order is an effective appeal, the negative team may wish to argue that individual liberty is a more effective or a more important value. Initially, they may want to argue that law and order is important only if the guilty individuals are caught. A negative team may agree that guilty people should be punished, but the issue is: How do we know that an individual is guilty? We

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all start with the presumption that an individual is innocent until proven guilty. If we accept this premise it is logical to assume that some of the individuals that the police investigate will turn out to be innocent. It is thus in our advantage to use accurate procedures to decide if an individual is innocent or guilty. If we resort to the tactics used during the witch hunts of the 1600s, we may end up with a large number of convictions. In the process, however, we may destroy the lives of countless individuals who are innocent. One of the reasons our society promotes individual rights is that individual rights can promote the protection of the innocent in cases such as this. In some cases this may require the freeing of guilty individuals. For many individuals, however, the harm of placing the innocent in jail is greater than the harm created by letting a few guilty individuals free, especially since there is a societal value against placing innocent people in jail. From this perspective, individual liberty and law and order do not conflict directly, i.e., those protected by extending rights are often innocent. When the two do conflict, individual liberty may be the more important value.

There are other ways to weigh individual liberty against law and order. Some affirmatives may argue that law and order may be more important than individual liberty since it affects more individuals. After all, the individual liberty being violated is only that of a small number of people, while the benefits of reducing crime apply to all people in our society. This view is simplistic. Our society has always emphasized the value of individual rights over those of the majority (or it has at least emphasized that there are limits to the ability of the majority to limit the rights of the minority). In addition, while law and order may affect more individuals (and even this is debatable, given that the violation of individual liberty could potentially affect all citizens and it could chill the exercise of protected rights), the magnitude of the harm to the individual is greater than the magnitude of the benefits to any individual in society. While we may gain a slight decrease in crime as a result of an arrest, the person arrested will have his or her life changed drastically with the change caused by the arrest affecting the individual's self-concept, relationships with other individuals and friends, employment opportunities, freedom, and so on. It would be preferable for all of society to bear a slight decrease in security to counterbalance the large amount of freedom that the individual deprived of liberty would have to lose.[5]

It is also possible to argue that the rights of the individual should not be abridged, regardless of the consequences. Legal theorists such as Ronald Dworkin and John Rawls have provoked controversy by arguing that individuals have certain rights that can never be denied. This view has evolved from a legal philosophy known as natural law. This philosophy suggests that there are certain rights given to us as humans that are derived from a law which transcends human law.[6] These rights cannot be violated, regardless of the consequences of granting the rights. For example, if a mob wanted to kill an innocent individual and threatened to kill several other individuals if the first person were not handed over to them, the natural law philosophy would suggest that society would have no right to sacrifice the life of that one individual, even if granting that right involved the killing of more individuals. By extention, it is argued that we, as citizens, have certain rights that cannot be violated even if those rights create problems for society. These rights may include such things as the right to life, liberty, privacy, and so on. Some of these rights may be specified in the constitution, although others (such as privacy) may be inferred from natural law.

A wise negative team should be prepared to defend these values. This can be

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done by reading the works by Dworkin, Rawls, John Stuart Mill, and others. The American Civil Liberties Union has even compiled a series of works containing readings on various liberties such as the right to privacy, the right to due process of the law, and so on.[7] A debater may also want to examine some of the entries in one of the many books of quotations such as those by Bartlett, George Seldes, and the *Oxford Dictionary of Quotations.* These and other works will contain a number of quotations that will be useful for rhetorical purposes.

Police Control vs. Police Autonomy

The conflict between individual liberty and law and order is not the only conflict implied by the first resolution. There is also a conflict between the need to control police and the need to give police autonomy. Some affirmatives may argue that there is a great deal of police brutality and that we need to control this brutality. One college team was very successful arguing that police use of deadly force was often excessive and we need to take some action to prevent this force.[8] Many of the issues we will discuss in talking about the exclusionary rule in the third section of this essay concerns the ability of society to control actions of the police.

Negative teams may want to develop arguments detailing the ability of the present system to control police actions. The exclusionary rule is one method of controlling the police, but there are other methods. Often police departments have internal review procedures to control the members of their force. In addition, some departments have citizen review boards. In many cases the media will prevent the police from covering-up a violation of due process. There are other remedies available as well. The victim of abuse can always sue the offending party. This may be done under Title 42, Section 1983 of the federal code, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This section has been held to permit an individual who is denied a constitutional right by the police to sue the individuals involved.

The individual who is subject to police brutality or who is otherwise denied his or her rights can also prosecute the individuals involved. Title 18, Sections 241 and 242 of the United States code authorizes the federal government to prosecute individuals that violate the civil rights of other individuals. Police brutality could fall under these sections in some cases, although there are some limitations on the ability of the Civil Rights Division of the Department of Justice to prosecute under these sections.

While there is some desire to place increased control on police in some jurisdictions, there are also forces that suggest that such a move would not be desirable. If additional constraints are placed on police, several bad side effects could result. Police who already resent restraints imposed upon them by the court systems may react negatively to new restraints. Some police may choose to quit, with the result being that we will be left with an inadequate number of

police. Even short of this, the police may stage strikes or sick-outs to protest against the new policy, and the result could be disastrous. Even if this is not the result of new restrictions, some have argued that if the checks on police are too strict, the police may become intimidated by the policies, and the result may be that the police would be afraid to take risks and their efficiency might decline.

These changes could have other effects. If the ability of police to combat crime is diminished, citizen groups may be created to fill in the gap. Groups of vigilantes may arise that will attempt to control crime using their own tactics. These groups will attempt to guard against crime by developing their own patrols and their own private police networks. This could be undesirable for several reasons. First, the private police may not follow all the rules that bind police; the result may be even more violations of individual liberty. Second, the private police will not be as well trained as the police. It is possible that they will be hurt when they come into contact with criminals since they will not know how to react.

Police Investigative Techniques

The conflict between the need to control the police and the need to provide some freedom for police to act will exist for all types of crime. Many cases this year will focus on the more common crimes like burglary, murder, assault. For many of these crimes the police employ a number of investigative techniques that may form the basis for affirmative cases. Such cases may include regulating search and seizure techniques, controlling search warrants, permitting the stopping and frisking of individuals, relaxing the requirements of warning a suspect of his or her rights required by the *Miranda* decision, allowing the use of lie detectors by police, setting standards for determining if an individual was entrapped, and creating standards for confessions. In most of these cases the proponents of reforms will be proposing changes that will restrict the freedom individuals can exercise. Changes in laws regulating search and seizure can lead to the invasion of privacy of countless individuals. Many individuals believe that their homes and personal belongings should be immune from random searches, while extending power to search to police may undermine this security. Relaxing standards for confessions may lead to forced or coerced confessions which may not be reliable. In all these cases the reforms may undermine the individual's rights.

Law Reform to Combat Organized Crime

Other cases may emphasize the need to reform criminal laws in order to combat organized crime. While there have been a number of important successes in our fight against organized crime in recent months, many teams will argue that additional reforms need to be made. These changes may include the passage of laws permitting prosecutors to grant immunity to witnesses in exchange for testimony,[9] the use of wiretaps by investigators, or changes in rules governing informers. Again, these changes will involve trade-offs with various other rights. Immunity laws undermine the protection of the Fifth Amendment. Wiretapping may invade the privacy of numerous individuals. The use of informants may involve a number of complicated trade-offs involving the ignoring of some crimes in order to gain information about other crimes.[10]

Special Preventive Techniques

The final set of cases will identify specific types of crime that need special

preventive techniques. These crimes may include white collar crimes such as embezzlement and computer crimes, drunk driving, arson, rape, wife abuse and child abuse, and riots. While some of these cases will require specific research, in many cases it will be easy to identify the values being served by existing laws. If it is hard to prosecute under existing laws, it may be due to the necessity of preventing an innocent individual from being unjustly charged with a crime.

Resolved: **That the United States should establish uniform rules governing the procedure of all civil courts in the nation.**

While the first resolution addresses the issue of the investigation of crimes, the last two resolutions are concerned with the procedures of the courts that resolve the disputes. The civil court topic addresses the method of resolving disputes between two or more individuals, while the criminal topic addresses the method of determining the guilt or innocence of individuals charged with a crime. While there are many differences between civil and criminal courts (the types of cases heard, the nature of the discovery process, and so on), there are several features that both types of trials have in common. In order to understand the nature of our justice system, it is important to examine the common elements of these two types of trials.

Adversary Process

The basis of the American judicial system is the adversary process. In the past, disputes between individuals have been settled through a variety of means — tossing a coin, duals, trial by ordeals, fights, and so on. From these methods of deciding disputes has evolved the adversary system. The thesis behind the adversary system is that each party in a dispute should be provided an attorney to assist in preparing a case (although the attorney is often paid for by the parties in the dispute), and each side is given an opportunity to present the best case available. After both sides have presented their case, the dispute is resolved by an impartial third party (either a judge or a jury). This method of resolving disputes has been attacked by many individuals.[11] Many of the attacks focus on the tendency of individuals to emphasize winning a case instead of discovering the truth. Others note that often the participants in a dispute tend to have unequal resources, so the party with more money and/or better lawyers will have an advantage at the trial.

On the other hand, several individuals argue that the adversary system is the best way to resolve disputes. By separating the function of the judge from that of the adversaries, the system preserves the independence of the judge. Rather than forming an opinion early in the deliberation, the judge can withhold judgment until all information is available. By allowing each side to present a case, the system ensures that all sides have a chance to present their arguments. It also provides an incentive for each side to gather the best information on a position. If the decision is based upon the deliberations of a committee, it is possible that the committee may reach a premature decision. As a result, they may not attempt to gather information that would cast doubt on the decision they had reached. The adversary system ensures that all views are tested in the court.

Finally, the adversary system creates an atmosphere of fairness. The parties in an adversary system tend to feel that they have been treated fairly, given the structure of the adversary system. Even if one party loses a case, that party has had the opportunity to present a case to an impartial body. That opportunity increases the chance that the concerned party will feel that justice has been done.

While some teams will argue that the nature of the adversary system is undesirable and that we should replace the system with a new method of resolving disputes,[12] other teams will focus on a part of the system that should be altered. The main components that can be altered are the lawyers, the judge, and the juries. While all of these components are interrelated, there are some issues that concern mainly one of these components.

Problems With Lawyers

One part of the legal system that has come under increasing fire is the quality of the lawyers that operate within the system. Several critics of the judicial system, including the Chief Justice of the Supreme Court, have argued that the quality of lawyers is quite low.[13] Some teams may suggest methods of improving the quality of the lawyers, although those methods may either drive lawyers out of the profession or prove to be an inaccurate way of identifying incompetent lawyers. A more controversial area of concern is the nature of legal ethics. With the increased attention on ethics that came about as a result of the public outcry following the Watergate scandal, there has been a great deal of interest in the ethical behavior of lawyers. A portion of this concern is based upon the conflict caused by the adversary system. With the pressures placed upon a lawyer to win a case, the lawyer may be tempted to engage in unethical practices. There have been several publications devoted to a discussion of the ethical obligations of a lawyer,[14] but in recent months the controversy has become even more intense due to the publicity over the proposed changes in the ethics code of the American Bar Association.[15]

At the heart of the controversy is the ability of a client to confide in a lawyer. The proponents of the code suggest that a client should be free to discuss all the merits of his or her case with the lawyer. If a client is worried that the lawyer will reveal some of this information to a third party (in this case a law enforcement official), the client will be hesitant to talk freely with the lawyer. This would have two undesirable effects. First, it would mean that provisions requiring that a lawyer reveal illegal activities of his or her client would be counterproductive since if such a provision were passed the clients would not reveal this type of information to his or her lawyer. Second, it would interfere with the lawyer/client relationship since the client would become hesitant about speaking openly with his or her lawyer. The result is that the quality of the advocacy of a case would decline and the client would be less confident in the lawyer and the adversary system. For these reasons many feel that the client should be able to speak freely with his or her lawyer without fearing that the contents of that discussion would endanger himself or herself.[16]

There are other problems with enforcing ethical standards. It is often hard to prosecute lawyers for violating ethical codes. Many ethical provisions require that judges take action to enforce the standards. Unfortunately, many judges are reluctant to enforce provisions because they do not want to harm the lawyers or because they do not want to be criticized by other lawyers for being harsh on members of the bar. As a result, many provisions of the professional disciplinary system are not enforced.[17] The implications of this is that any affirmative team that argues for more stringent ethical standards without altering the behavior of judges may do little to solve the problem of legal ethics.

There have been many other proposals to remedy problems with lawyers. Some have suggested that we need to develop ways of making lawyers affordable to individuals without large sums of money. Since a legal battle may cost a

large amount of money, it is argued that some method of covering the costs of litigation should be developed. This problem has been addressed in many ways. For criminal trials, the case of *Gideon v. Wainwright* held that individuals who could not afford a lawyer in criminal cases should be provided with a free lawyer. Localities have compiled with this requirement through a variety of means, ranging from public defenders to methods of requiring local lawyers to defend the clients. There has also been an attempt to help individuals in civil suits pay for lawyers. Many private organizations like the ACLU and the AAUP provide financial aid or free lawyers to individuals whose rights have been violated. Many laws have provisions for awarding attorney fees to the side that wins the suit. The problem with decreasing the cost of litigation, however, is that, while decreased costs may help the poor, it will also increase the incentive for individuals to initiate suits that serve only to annoy the individual who is being sued. If a law suit does not cost money, individuals may sue when they have little basis for the suit.

Problems With Judges

Just as there are problems with lawyers, some have argued that judges pose problems for the legal system. Some have suggested that the method of appointing judges should be altered. In many cases judicial appointments are made for political reasons. In those jurisdictions that elect judges, it is argued that candidates may be elected due to their attractiveness rather than their judicial expertise. At issue is a concern about the quality of judges. The issue becomes: What constitutes a good judge? Should the judge reflect the interests of the citizens, or should the judge be independent of the interests of the citizens? Those who argue that a judge should reflect the interest of the voters argue that judges should reflect the opinions of the country. On the other hand, it is argued that judges need to be objective in making decisions, and they often need to protect the rights of the minority from the will of the majority. If that is the case, then the judge should be able to rise above politics and should be able to make decisions on the law without being concerned about the political ramifications of a decision. If a judge must worry about an election, the independence of the judiciary may be in trouble.

Even if we agree that the judges should be independent of the rest of the public, there are some times when we need to remove judges for improper behavior.[19] The problem with developing methods for removing judges is that if they are not properly constructed, the methods could be used to punish a competent judge that made an unpopular decision. This would have a chilling effect on judges and would reduce their independence. Many times judges are required to make unpopular decisions in order to preserve the rights of minorities or in order to resolve an issue that is very complex. In order for judges to be able to make these hard decisions in a fair manner, it is necessary that they be relatively free from outside influence.

Problems With Juries

Just as many argue for checks on judges, many have suggested that the jury system should be reformed. Many cases are tried before a jury. In the United States, everyone has the right to a trial by jury for both criminal and civil cases. While this right can be waived, in many cases a jury is used to resolve legal disputes. This use of juries is not without controversy.[20] There are many critics of the jury system. These critics argue that juries are often irrational and that

they do not know much about the law. Even when the jury is informed about the law, the argument is made that the jury will ignore the law and vote on issues unrelated to the legal requirements of a case. In addition, it is suggested that the jury system is expensive and wasteful.

Against such charges there are a large number of responses. The landmark work defending the jury system is a book by Harry Kalven and Hans Zeisel called *The American Jury.*[21] This work is sometimes referred to as the Chicago Jury Project. Kalven and Zeisel surveyed a large number of jury trials and they decided that in the vast majority of these cases, the judge and the jury agreed on the verdict. While there are some indictments of this study (such as the argument that judges were asked to give their verdict after the jury had reached its verdict, so that the judge may have been influenced by the jury's verdict), this work has been very influential in guiding research on jury behavior.

There are other defenses of the jury system. Some have argued that the jury system enhances democracy. Serving on a jury is the only direct involvement most citizens have with government (other than voting and paying taxes). The jury duty acts as a method of educating Americans about the way our government works. It allows the citizen to have an input into the decision-making process and it allows them to discover the way that government works. While this educational process may cost money, many individuals think that democracy may benefit from this expenditure.

Related to this educational process is the use of the jury to nullify harsh laws. In some cases a jury may decide that a law should not be enforced, and the jury will reach a verdict of innocence in order to nullify the law.[22] One of the most famous cases was that of Peter Zenger, a publisher during the colonial times. At the time, it was illegal to publish bad things about the government even if the statements were true. Zenger was charged with publishing statements about the government which, although they were true, were unfavorable to the government. Zenger's attorney argued that, even though the law permitted his client to be punished, the jury should not convict his client, and the jury agreed and freed Zenger. While this type of case does not arise often, there are many who argue that a jury can help moderate severe laws and that they can decrease the chance that individuals will be punished for acts which, although they are illegal, are no longer worthy of public concern. For some victimless crimes, for example, the jury may assist in decreasing the penalties applied in the case. This allows us to keep certain laws on the books to express society's judgment about the correctness of certain actions, while at the same time we can be secure in knowing that these laws will not be applied arbitrarily.

The jury may also help individualize punishment. Since the jury is drawn from the local community, there is a sense of fairness that is promoted by the jury system. Individual litigants feel they have been fairly treated since the decision is reached after a careful deliberation by several individuals. This verdict is also tailored to the individual case. It is arguable that juries should treat different people differently since each individual case has a separate set of facts that may dictate a harsher or lighter sentence. The jury system allows us to tailor the decision to the individual being tried.

Even if the jury system should be retained, there are those that argue that certain reforms should be made in the jury system. Some of these changes concern the method of selecting juries. The jury is selected through a method known as *voir dire,* literally, "to speak the truth." This process involves several stages. First, a list of prospective jurors is created. These lists are frequently made from

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the lists of voters, but it is important that whatever method is used the list should represent a cross-section of the population or the list may fail to produce a balance of jurors. In the past, for example, some jurisdictions kept members of minorities off jury lists, which made it impossible to provide a fair jury for members of a minority.

Once a list of prospective jurors is made, the lawyers for the two sides ask the jurors questions in order to find out if the juror can be fair.[23] To ensure that the jury is fair, both lawyers can challenge a juror and have the juror removed from the panel. These challenges fall into two categories. All lawyers have an unlimited number of challenges for cause. This is a challenge that is made when the lawyer can establish, to the judge's satisfaction, that the prospective juror cannot render a fair decision. This type of challenge may be made when a juror knows one of the parties in a suit, for example. The second type of challenge is a preemptory challenge. This is a challenge that can be made without presenting a reason. Each side usually has only a limited number of these challenges, but these challenges can be used to remove a juror that an attorney does not think should be on the jury. This type of challenge is often made when an attorney does not want an individual on the jury, but the reason for that desire is not one that can be expressed to a judge. For example, a lawyer may not want any college-educated person on a jury, or the lawyer may think that individuals of a certain nationality would not be favorable for his or her client. This practice has also been criticized for allowing lawyers to remove minorities from juries using the preemptory challenge.

There are other issues that concern the nature of the jury. While issues of jury discrimination have become less important given past Supreme Court decisions, the mechanics of the jury composition has become an issue of controversy. Some have argued that the size of the jury should be reduced to 6 (from 12) in order to reduce costs. This reform has been criticized since many people have argued that as the size of the jury decreases, the number of viewpoints represented in the jury would decrease. In addition, even if the number of viewpoints remains the same, the larger the jury the greater the chance that more than one individual will support a viewpoint. There is a great deal of literature on conformity which indicates that if only one person holds a view, there is some pressure to conform to the wishes of the majority. If that one individual has a supporter in the group, however, the individual is more likely to express his or her viewpoint. Since the jury process is aided by allowing the greatest number of views to be expressed, a reduction in the size of the jury would be undesirable.

There are also those who would like to see the requirement of a unanimous verdict in criminal cases modified. While many civil cases are determined by a majority vote of the juries, criminal cases require a unanimous verdict. When the jury cannot agree on a verdict, a mistrial is declared and the prosecution has the option of retrying the case. This process can be very costly in time and money. At the same time, many people support the requirement that a unanimous vote take place before an individual is convicted. This requirement prevents the jury from reaching a hasty verdict. Rather than ignoring the opinions of a minority, the majority can be forced to listen to those viewpoints. The result of this may be that a superior verdict is reached since all sides will be expressed in the jury deliberations.

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Depositions and Interrogations

The elements of the adversary process (the judge, jury and lawyers) are present in both a criminal and civil trial. There are some features of a civil trial that differ from those of a criminal trial. Probably the most prominent of these features is the discovery process.[24] Prior to a trial, but after a civil suit is filed, both sides of a dispute can gather information about the evidence that the other side has available to it. This can be done in two ways. First, a deposition may be taken from potential witnesses. A deposition consists of a transcript of the responses that the prospective witness makes to a series of questions. Normally, the witness will be asked to come to the office of the lawyer of the other side where that lawyer will ask the witness several questions which are then transcribed by a legal secretary. In addition, the lawyer may ask the other party to reply to written interrogatories, which are written questions that the other party is asked to respond to in writing. The other side may also be asked to produce documents that would be relevant to a case.

The philosophy behind the depositions and the interrogatories is that the best way to resolve a dispute is to allow both sides to become aware of the evidence the other side has available to it. In this way there can be no surprises at the trial, since both sides know in advance what the other side has. One result of this is that many civil cases (over 90%) are settled before the case ever reaches a trial. This is true because, since both sides know what the other side has available to it, both sides can predict the outcome of the trial. As a result, the parties may settle out of court to avoid the costs of litigation, publicity, the emotional stress of going through a trial, and other costs involved in filing a suit. For these reasons many individuals support the discovery process, and some have argued that the process should be extended to criminal trials.

Weaknesses in the Discovery Process

At the same time there are critics of the discovery process. These people argue that the process creates a large amount of paperwork. While this paperwork may create some benefits (for example, the memories of witnesses may be fresher right after an incident as opposed to two years later when the case reaches trial), in many cases the paperwork simply burdens the involved parties and adds to the cost of the trial (since the litigants must pay for the depositions). In addition, the discovery process can be used to harass some litigants. One party may file a large number of interrogatories, not to gain any information, but simply to keep the other party busy and to increase the amount of time and money that a weaker party must devote to a case. As a result of this, the wealthier party may intimidate the less well-off party into dropping a case or settling for a lower amount of damages. While there are some checks built into the discovery process to attempt to minimize the abuses of the discovery process, many have suggested that these checks need to be strengthened. The strengthening of these checks, however, may decrease the effectiveness of the discovery process. The judicial system must thus decide between the value of keeping costs of litigation low so that poorer individuals have access to the court, and the value of providing both parties with enough information to rationally determine the strength of their case.

Class Action and Civil Suits

There are a large number of other cases that an affirmative team may wish to

argue. The area of class action suits, which involve the sanctioning of one lawyer to represent a larger group of individuals, has potential for development. This type of case would focus on the trade-off between permitting redress for a class of individuals that are each hurt in a minor way by an industry, as opposed to the value of minimizing litigation. Other cases may focus on a specific type of civil suit. It has been argued, for example, that we are becoming a litigious society.[25] We turn to the courts to resolve disputes about medical malpractice, product liability, automobile accidents, civil commitments, anti-trust cases, maritime law, administrative procedures, tax matters, bankruptcy hearings, patent disputes, stock fraud, wills, divorces (and palimony suits), as well as a host of other matters. All of these areas may become the basis of an affirmative case. No negative team can be expected to be prepared for all of these types of cases, but the negative team may attempt to develop some generic strategies against all of these types of cases.

One approach might be to ask: Who benefits from the current ways of handling disputes? In any case there are both winners and losers. While the affirmative team may emphasize the plight of the loser in a dispute, the negative team should attempt to defend those who are currently helped by the civil procedures now in force. The negative debater in effect must become an advocate for those parties that would be hurt by the proposed reforms. This involves minimizing the importance of the complaints of the party championed by the affirmative team and defending the interests and values of those who would stand to lose if the reforms were implemented. In addition, the negative team may wish to explain why any change in the way courts operate would be disastrous. Some of the potential arguments behind this position will be discussed at the end of the third section of this paper.

Resolved: That the United States should establish uniform rules governing the procedure of all criminal courts in the nation.

While the second topic concerns the way that civil suits are resolved in the nation, the third topic addresses the methods that should be used in resolving criminal disputes. Many of the issues of criminal courts, such as the problems with the adversary system, issues of legal ethics, lawyer quality, judge selection, and jury selection were discussed in the second section of this essay. Other issues are unique to the criminal justice system.

Exclusionary Rule

One of the most controversial rules governing criminal procedure is the exclusionary rule. The exclusionary rule, first developed in the case of **Mapp v. Ohio** holds that any evidence that is seized in an illegal manner cannot be admitted into a court. Thus, if the police obtain information about a crime through an illegal means, that evidence cannot be used against the criminal.[26] This does not mean that the criminal is set free, only that the evidence cannot be used in a court of law. If illegal evidence is used to gain a conviction, then the case is sent back to another jury and the case is retried without the illegal evidence. If the police can gain a conviction without the illegal evidence, then the guilty party can still be sent to jail.

The opponents of the exclusionary rule argue that the exclusionary rule is undesirable since it permits the guilty to go free. In addition, they argue that it is

ineffective in preventing police from using illegal police techniques, and that other means exist to prevent police from using illegal methods. All of these issues are open to dispute. Since the exclusionary rule bans only the illegal evidence from a courtroom, it is possible that the police could still gain a conviction using the legally obtained evidence. In addition, many argue that the exclusionary rule may help stop abuse of police power. Without the exclusionary rule, it is argued, police would have little incentive to follow the law, since illegal evidence would be just as acceptable as legal evidence. The result of this would be that police would conduct many illegal searches and seizures and that individual liberty would not be protected without the rule. While some remedies from police abuse may exist (some of these were discussed in section one), these remedies need to be supplemented with the exclusionary rule. Many of the remedies are costly and time consuming. The exclusionary rule, on the other hand, is an easy remedy to police abuses.

There are other justifications for the exclusionary rule. The exclusionary rule may help compensate the accused party for the violation of liberty inflicted upon that individual by the police. In addition, the exclusionary rule may help promote the dignity of the court by withholding any sanctioning of the illegal activity of the police. The major justification of the rule, however, is that it will prevent police from violating the individual liberty of the individuals accused of a crime. From this perspective, the guarantees in the Constitution against unreasonable searches and seizures would have little value if the courts did not attempt to enforce these prohibitions on the police. The exclusionary rule is the best way to enforce these prohibitions.

There have been many changes in the exclusionary rule over the past few years, and it is likely that the Supreme Court will modify the exclusionary rule sometime during this debate season. One development has been the adoption of a good faith exception to the exclusionary rule. This exception allows courts to permit illegally obtained evidence to be used in a court if the evidence was seized in good faith. This standard was adopted by the Fifth Circuit of the United States Court of Appeals in the case of *United States v. Williams* in 1980. Although this decision has been supported by many judges, it should be noted that this is only a circuit court decision, and it is thus binding only on that circuit. In addition, although the decision was upheld by the Supreme Court, it was upheld for reasons not related to the exclusionary rule, so the part of the case related to the exclusionary rule has not yet been approved by the Supreme Court. Thus, while the current cases suggest that the exclusionary rule may be losing some of its force, it will still exist in some form for the foreseeable future.

The opponents of the "good faith" exception to the exclusionary rule suggest that any departure from the exclusionary rule may be undesirable. Any set of exceptions to the exclusionary rule must, by its very nature, be vague. What do we mean by "good faith"? What is a serious invasion of privacy? All of these issues will create an uncertain atmosphere. In addition, the good faith standard requires that courts read the minds of the police — a task that is obviously difficult. How can a jury decide what an officer was thinking when he broke into a car? These issues make the good faith standard a hard one to apply. In any case, the negative team needs to develop a strong defense of the exclusionary rule based upon the ability of the rule to deter illegal actions. Specific proposed changes in the exclusionary rule should be evaluated as they relate to the exclusionary rule's ability to deter illegal police activities.

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Plea Bargaining

While the exclusionary rule focuses on what material may be used at a trial, many teams may wish to focus their attention on the events leading up to a trial. Many cases involving a crime never reach the court, or else they are settled out of court through a process known as plea bargaining. The plea bargaining process is a method of resolving a criminal case out of the courtroom environment. Usually the defendant and the prosecutor will get together and the defendant will agree to plead guilty to a lesser charge if the prosecutor drops the initial charge. Instead of being tried for murder, for example, an individual might plead guilty to assault with the intent to kill.[27]

There are several reasons why plea bargaining is used in criminal courts. For the defendant, plea bargaining offers certainty instead of the uncertainty inherent in a jury trial. The plea bargaining limits the amount of time that the defendant would have to serve in jail. For the prosecutor, the plea bargaining process guarantees that the guilty party will serve at least some time in jail. In addition, plea bargaining may encourage a guilty party to divulge information that may be used to convict another criminal.

The entire issue of plea bargaining is a very controversial one, with many individuals calling for its abolition or modification. The main argument against plea bargaining is that it may distort justice. It is argued that many innocent individuals may be coerced into pleading guilty through the process. As a result, many innocent people may go to jail. At the same time, many guilty individuals end up serving only light sentences when they should be convicted of a more serious crime. Either of these outcomes is undesirable, for one punishes the innocent and one frees the guilty.

At the same time, it is argued that the plea bargaining process may enhance justice. Many observers note the distinction between factual and legal innocence. A person may be factually guilty (that is, the person committed the crime), but for some reason the individual could not be convicted of a crime if the case went to court (for example, if evidence was illegally obtained, or if the evidence is not conclusive). The plea bargaining process in these cases may be the only way to guarantee that the guilty party serves time in jail. If the case reaches trial, the party may be set free, while the prosecutor may be able to convince the individual to plead guilty of a lesser charge (especially since the defendant may be unsure how strong the prosecutor's case is). The result is that plea bargaining may be the only way to ensure that some guilty parties serve any time in jail.

At the same time, the plea bargaining process may help the innocent. While some innocent may be persuaded to plead guilty when they are innocent (due to fear of the trial or other factors), it is possible that this may be in their benefit. After all, it is possible that, had the case reached trial, the innocent individual may have been convicted, in which case by plea bargaining the innocent person ended up with a lighter sentence that he or she would have otherwise served. If this is the case, plea bargaining would help the innocent.

From the previous discussion it should be clear that plea bargaining has a wide range of potential effects on the justice system. It can convict innocent people or it can see that the damage to innocent individuals is minimized. It can let guilty people go free on reduced charges or it can ensure that they serve some time. The question becomes: Do the beneficial uses of plea bargaining outweigh its problems?

This issue can best be resolved by examining the process of plea bargaining.

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No one is forced to plea bargain; rather it is a process of negotiation between the two parties in a criminal case. The prosecutor does not have to offer a plea bargain, and the defendant does not have to accept a plea bargain if it is offered. This would suggest that the ultimate resolution of the case would be a fair one. The prosecutor in most cases would not let an individual plea guilty to a minor crime if the prosecutor had an iron-clad case against the individual. In a similar way, no individual that is certain that he or she would not be convicted would agree with a plea offer. The main examples of plea bargaining occur in the middle range of cases. If the lawyers are smart, the plea bargaining process will emphasize positive and minimize negative results of the criminal justice system. Prosecutors will not bargain away strong cases and defense attorneys will not sell-out their clients. A negative team should thus research the positive effects of plea bargaining and the team should also explain why the process of plea bargaining will promote the desirable ends of the negotiation process over the negative results. This can be demonstrated by analyzing the motives behind the individuals involved in the plea bargaining process. Neither attorney wants to establish a reputation as being a poor bargainer, or else in the future other negotiators will refuse to bargain with that lawyer. As a result both parties have an incentive to be fair in their bargaining position. In addition, there are some outside checks on the plea bargaining process. In many cases a judge has a great deal of influence on the negotiation process; he could minimize any abuses.

An affirmative team that argues for the abolition of plea bargaining makes an assumption that may not be warranted: that plea bargaining can be eliminated. There are many individuals who think that plea bargaining cannot be eliminated; new restrictions will just alter the form of plea bargaining (see the Ackley article in footnote 27). The methods of circumventing a ban on plea bargaining are numerous, including the shifting of the bargaining process to the period prior to filing a charge. While some may point to certain jurisdictions that have, in fact, banned plea bargaining (for example, Alaska), some have argued that the term plea bargaining is a very broad one and the bans on plea bargaining have merely shifted its form.

It would be wise for the negative team to research the effect of banning plea bargaining in those jurisdictions that have attempted such an action. In August, 1975, for example, Alaska banned all plea bargaining except in a few isolated cases. There has been a great deal of literature discussing the effect of this policy. Any negative team confronted with a plea bargaining case should be familiar with the literature on this subject. The team should be also prepared to explain why Alaska is not a good example to use in predicting the effects of plea bargaining. Other jurisdictions that have banned plea bargaining (like El Paso) have had different results with their policy. Alaska may be an atypical state due to its size and population. It is also possible that other reforms adopted by Alaska at the time plea bargaining went into effect may have prevented some of the undesirable side effects; any plan that bans plea bargaining without adopting these same reforms may not produce the same effect. Finally, even within the state of Alaska, the ban on plea bargaining had some inconsistent effects. The city of Fairbanks reacted in a different way to the ban than did the city of Anchorage, for example. If this is true, then we cannot be sure that the effects of the experiment can be generalized nationwide.

One important concern about the effect of banning plea bargaining is the effect that such a ban will have on the court system. Right now, over 90% of the

criminal cases are settled prior to trial. If plea bargaining were prohibited, many of these cases would have to be tried in court, and this could overburden our court system. While there is evidence that this has not been the case in those jurisdictions that have banned plea bargaining, it is still a concern for many legal scholars.

Victims of Crimes

Another area of the criminal justice system that concerns many individuals is the involvement of the victims of a crime into the criminal justice system.[28] Many critics of our current justice system argue that because the legal system spends too much time being concerned with the rights of the accused, the victim gets left out of the legal process. Numerous proposals have been introduced to solve this problem. Some have argued that the victims should be consulted more in the early phases of the criminal investigation procedure. Others have suggested that a bill of rights for victims be established. Still others have urged that the United States develop a system of compensating victims for any harm they endure (this is usually limited to compensation for physical abuse to minimize the risk of fraud). The common value behind all these proposals for reform is the need to protect the victim and to allow the victim to have some input into the decision to prosecute the criminal.

At the same time, involving the victim may have undesirable side effects. While it may increase the reporting of crimes, the additional crimes that are reported could further backlog the courts. If the victim must be involved in the negotiation process, the result could be a drastic reduction in the number of cases that are settled through the plea bargaining process. In addition, the victim may not be extremely objective, and the emotional nature of the victim could hamper the efficient administration of justice.

Pre-trial Procedures

Another area of possible reform concerns pre-trial procedures. Prior to the trial, in most jurisdictions it is required that the prosecutor go in front of a grand jury in order to get an indictment of the defendant. The indictment merely indicates that the grand jury thinks that the prosecutor has enough evidence to warrant a trial. It does not mean that the individual is guilty, only that there is enough evidence to look further into the matter. Some have argued that this step in the criminal process should be eliminated or modified, although it has been defended as a way to prevent wasteful trials. Other areas of pre-trial procedure that have been discussed include bail reform, pre-trial discovery, and altering pre-trial conferences.

All of these reforms attempt to improve the administration of justice. Pre-trial discovery attempts to transfer the discovery process from civil cases to the criminal cases. The trade-offs that this involves were discussed in the last section of this essay. Those who argue for bail reform suggest that high bail discriminates against the poor, hinders the preparation for a case, and punishes innocent people. Those defending the bail system argue that it prevents individuals from leaving town before a trial takes place (thus avoiding punishment), and it prevents criminals from intimidating witnesses or committing other crimes. In addition, it is argued that there are regulations that guard against excessive bail.

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Free Press vs. Fair Trial

Another type of controversy is caused by the inherent conflict between the free press and the desire for a fair trial. This conflict can be seen in two areas. First, many have argued for restrictions on the press' ability to cover trials. It is argued that if the press is allowed to cover trials, then the publicity will prevent the accused from having a fair trial. With all the newspaper articles and TV stories concerning the trial, it is suggested that the jury may be influenced by the media more than by the facts of the case. The media can also pressure the jury to vote in a certain way.

There are numerous responses to this position. First, it could be argued that there are many ways to minimize this problem. Juries can be kept in isolation during the trial. The jury can be instructed to ignore what they read. If necessary, the defense can request a change of venue, which asks the judge to move the case to a location where the case can be tried fairly. If the media in one city covers a case, for example, the case may be tried in a city that did not publicize the crime.

A more important argument is that the press has a right to cover the trial. Since the First Amendment guarantees freedom of the press, any attempt to restrict the press violates that guarantee. This guarantee is vital in that it allows the press to make sure that justice is done. If all trials were secret, for example, gross errors might be ignored and individual liberties could be denied without anyone hearing about it. The press, by covering trials, checks against misuse of authority. In addition, by publicizing the trial, all citizens are shown that justice will be done and that the guilty will be punished. This could help deter potential criminals from breaking the law.

A related issue is the use of cameras in the courtroom.[29] This controversy concerns several issues, ranging from whether or not the media should be allowed to televise trials, to whether or not videotaped testimony should be allowed in court, to the issue of whether or not experiments conducted with videotapes can help us understand the legal process. Proponents of videotape argue that the process is more accurate and may be faster than regular trials. Opponents argue that it may distort the trial and may increase the cost of the legal system. Perhaps the strongest negative position on this issue is to argue that in the area of electronic media in the courtroom, this is one issue that needs to be studied in more detail. Rather than adopting a national policy based on incomplete information, we should let the individual states experiment with various types of policies — letting the best policy emerge from this experimentation.[30]

Death Penalty

The sentencing process has also been criticized by many individuals. Some have focused on specific penalties that should be modified. Frequently, critics of the system point to the death penalty as a penalty to be abolished as a cruel punishment that is often applied discriminatorily. Proponents of the death penalty argue that it does deter crime, that past abuses of the penalty have been corrected, and that many safeguards exist to ensure that no innocent individual is executed.

Mandatory Minimum Sentences

A related issue is that of mandatory minimum sentences.[31] Some have argued that for certain crimes there should be a minimum sentence that should be given

to any individual who breaks the law. This would increase deterrence and it would delay the return of these criminals to society. Opponents of this procedure argue that it could have an adverse effect on the plea bargaining system (or the plea bargaining system could be used to circumvent the minimum sentence). Such a policy could also affect our prison system. Since the minimum sentence would increase the amount of time that a prisoner would remain in prison, this could lead to an overcrowding of our prison system. As a result, either other prisoners would be released to make room for the new prisoners, or new prisons would have to be built.

It is also possible that the mandatory minimum sentence may be counterproductive. If a jury realizes that a vote of guilty means that an individual must face a certain minimum sentence, they may be reluctant to convict an individual. If the minimum sentence is harsh, a jury may very well reason that — although the individual is guilty, the crime does not warrant the minimum sentence required by law. As a result, minimum sentences may decrease the conviction rate and increase the number of criminals who go free.

Insanity Plea

Other penalties have also been under attack in recent years. In the weeks after the Hinkley trial, many individuals criticized the insanity plea.[32] Many have suggested that the insanity plea has become a method of permitting guilty individuals to escape punishment. On the other hand, it is argued that even those who escape prison through an insanity plea must spend time in mental institutions, which can serve the same function as a prison. In addition, it is arguable that a mental hospital may be better than a prison for some individuals, since the mental hospital is better prepared to help rehabilitate an individual. While there are many examples of individuals who leave mental hospitals and go on to commit a crime, it is argued that there are also examples of individuals who are helped by mental treatment (although these cases are not publicized). Finally, it is suggested that the insanity plea is consistent with our view of justice. It is only just that no individual should be held responsible for an act over which that individual has no control. A child that commits a crime should be treated in a different manner than an adult. By extention, an adult who, for one reason or another, is not in control of his emotions should not be treated the same as an adult who knowingly commits a crime. The insanity plea is one way to ensure this distinction is considered at the trial. While the insanity plea may be misused, the philosophy behind the plea does promote a fair treatment of the accused.

Trial Process

Another area of controversy concerns the process of the trial. Some have argued that the gathering of information about accused individuals may invade their privacy.[33] In many jurisdictions an individual charged with a crime, but found innocent, may still be harmed because the record of his arrest may be kept on file. Although there are ways of removing the arrest record from the individual's files, these procedures may be costly or time consuming. Proponents of the use of arrest records suggest that this type of information may be useful in investigating some crimes and in setting bail. In addition, some have argued that employers have a right to this type of information.

Still another area of affirmative concern is the possibility of permitting the prosecutor to appeal a case that it loses.[34] Currently, the accused can attempt to appeal a case that was decided in a manner that was unfair. The prosecution,

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however, does not have this right. As a result, in cases where the guilty person is let off or when the sentence handed out is low, the prosecution is helpless to do anything about the verdict. Giving the prosecution the ability to appeal a verdict could prevent this type of injustice. On the other hand, giving the prosecution the ability to appeal may permit the government the ability to harrass innocent individuals or to keep them in limbo regarding their status.

Extending Current Procedures

Three final types of cases should be of some concern to the negative team. The first type of case will attempt to extend current criminal procedures to certain courts or groups that are not covered by existing rules. This type of case could include cases concerned with the military justice system, juvenile courts, or Indian courts. For all of these groups, the negative team may wish to argue that because current criminal justice procedures are unjust, they should not be extended to other courts. In addition, the negative team may wish to analyze the reasons why these legal systems do not conform to traditional legal norms. The military justice system, for example, needs to promote discipline. It could be argued that the military courts need a set of procedures that would not be acceptable in normal legal procedures. The legal system of Indians may be a product of their unique social background, in which case imposing our system on them would violate their sovereignty. Since juveniles may not have the maturity of adults, they should not be treated in the same manner as adults. In all of these cases the legal systems may be justified because the values that they are designed to promote are not the same values that underpin the traditional court system.

Admissible Evidence

A second type of case would focus on the types of evidence which are admitted in court. These cases would isolate such techniques as eyewitness testimony, informers, hypnosis, lie detectors, and so on. Behind all of these cases is the issue of what evidence should be admitted in court. There are two considerations that should be addressed by the negative team. First, the team should ask if the evidence would violate individual rights. The use of lie detectors, for example, could be argued as violating the privacy of the individual that is questioned. Second, the negative team should ask what degree of reliability is needed in order to admit evidence in a court. No evidence is perfect; confessions can be coerced, tapes can be edited, and so on. If we seek certainty, then we may want to ban large categories of evidence, e.g., eyewitness testimony, since it is often inaccurate. If we set our standards too high, the result may be that no evidence is ever admitted, and no person is ever convicted. If we set our standards too low, then innocent individuals may be convicted.

The negative team should be prepared to defend either a high standard for evidence (which would defeat cases that argue for new evidence to be used in courts), or that a low standard is desirable (in which case existing evidence, though imperfect, could be used). The premise is that no courtroom evidence is perfect; the question is at what point is the evidence adequate for a jury. The negative team can also argue that admitting evidence into a courtroom does not mean that the jury will believe the evidence. It is possible (depending on the case) to argue either that the jury will reject unreliable evidence or that they will give too much weight to the evidence if it is allowed in the courtroom.

Procedures and Law Enforcement

The final type of case will use criminal procedures to either help enforce a law or to hinder the enforcement of a law. These cases may argue for the legalization of marijuana, preventing corporate crime, helping fight rape, wife abuse or child abuse, stopping drunk drivers, or preventing riots and/or arson. For many of these cases, the best strategy may be to present a counterplan. This counterplan would suggest that the best way to solve these problems would be through laws that do not affect criminal procedure. In some cases, the negative team may want to argue that the best way to combat a crime is through civil procedure instead of criminal prosecution. It may also be wiser to legalize a crime directly instead of indirectly (a negative team may wish to research the literature on plain language statutes for this type of a counterplan). If the negative team does counterplan, they need to demonstrate that their counterplan is not topical, i.e., it is competitive with the affirmative plan (both the plan and the counterplan cannot exist at the same time), and that their counterplan is superior to the affirmative plan.

Short of counterplanning, the negative team may try another strategy. They could argue that the means the affirmative team proposes undermine values to which the crimes are related. Laws that make it easier to prosecute for spouse abuse may undermine the family. Other laws may undermine the rights of the accused. In any case, there are usually values that conflict with the affirmative policy. The negative team needs to discover the nature of these values and explain why these values are important.

Confidence in Supreme Court

In addition to the values already mentioned, there are three general types of values conflicts that apply to a wide number of cases on all three topics. The first area of consideration is the relationship between a plan and the confidence of the Supreme Court. The Supreme Court is in a very vulnerable position in our society. Since the Supreme Court cannot enforce any of its decisions, it must rely on other branches of government to support its decision. If Congress overturns a Supreme Court decision, this may intimidate the Supreme Court, therefore preventing it from extending its decisions in other areas of civil liberties. This would occur only if Congress overturned a decision; not if it expanded a right. The result of this intimidation is that the Court may become conservative — a condition which may prevent it from taking needed actions.[15]

Judicial Overload

A second area of concern deals with judicial overload. Currently, an extremely large number of cases are reaching the courts.[16] Many have argued that the courts are overburdened by these cases. Many affirmative cases may increase this court load by requiring that the court interpret the nature of their plan, e.g., What is "good faith" or a "plea bargain"? Plans themselves may directly increase the number of trials. As the backlog of cases increases, the courts may end up making poorer decisions. They could turn to even more plea bargaining. They could hurt justice by increasing the time between a crime and the trial, e.g., some people will be in jail awaiting trial, some witnesses will forget details about a crime.

Possibility of Uniform Rules

A final issue that needs to be addressed is whether uniform rules are possible.

Some legal theorists[3] have argued that laws are inherently vague. As a result, even if a new guideline were established, the courts in the various jurisdictions will interpret the same law in various ways. Thus, a uniform rule may be applied without uniformity. This would not only have topicality implications, but it could also prevent the plan from working.

CONCLUSION

The previous discussion should indicate the wide range of possible areas of the three topics that may be discussed this year. Obviously, any essay written in March cannot reflect the state of the topic in September. It is therefore important that any negative debater view these areas as being merely starting points for analysis. At the same time, as new cases evolve, the negative debater may want to think about how the new cases affect other parts of the legal process. How will increasing convictions affect the prison system? How will the plan work when 90% of all cases do not reach trial? In addition, the negative team may wish to think about the values that the legal system attempts to promote and ask how a policy affects those policies. Only by understanding the entire legal process can a debater understand the effects of changing even a small part of that process.

NOTES

[1]For a good introduction to the American legal system, see the special section of *U.S. News & World Report* on the U.S. legal system in the November 1, 1982, issue, pp. 35-58.

[2]For a discussion of some of these issues, see Stuart S. Nagel, *Improving the Legal Process* (Lexington, Mass.: D.C. Heath and Company, 1975), pp. 41-56.

[3]Raymond Paternoster, et al. "Perceived Risk and Deterrence: Methodological Artifacts in Perceptual Deterrence Research," *Journal of Criminal Law & Criminology*, 73 (Fall, 1982), 1238-1258. See also Jack Nagel, "The Relationship Between Crime and Incarceration among the American States," *Policy Studies Review*, 2 (1982/3), pp. 193-199.

[4]This assumes that the only way that law and order is promoted is through deterring crime. Some individuals argue that an arrest serves other desirable goals. Placing a criminal in prison can prevent crime either directly by incapacitating the criminal, i.e., the prisoner cannot commit a crime while he/she is in jail, or indirectly by allowing the prisoner to be rehabilitated while in prison (although the evidence on this effect is not strong). Finally, some argue that we should place individuals in prison out of vengeance: guilty people deserve to be placed in jail as a form of retribution for the damage that the prisoner has done (others argue that a civilized society should not act out of vengeance).

[5]It could be argued in response to this that the individual victim bears a significant burden when a criminal is not captured. This argument is true only if the effect of deterrence and/or incapacitation is very strong, i.e., for every arrest the amount of crimes committed is decreased by one or if the crime is a very serious one (the harm to an individual arrested for shoplifting, for example, is much greater than the damage inflicted on the storeowner. This would not be the case for an individual arrested for a major crime like murder or rape).

[6]See Ronald A. Dworkin, "'Natural' Law Revisited," *University of Florida Law Review*, 34 (Winter, 1982), p. 165. For a critical examination of natural law, see Ernest van den Haag, "Against Natural Rights," *Policy Review*, 23 (Winter, 1983), pp. 143-176.

[7]These works are published by the National Textbook Company.

[8]See Anthony V. Bouza, "Myths and Hard Truths about Police Shootings," *University of Toledo Law Review*, 13 (Winter, 1982), pp. 337-345.

[9]See "Current Controversies Concerning Witness Immunity in the Federal Courts," *Villanova Law Review*, 22 (1981-82), pp. 123-155.

[10]See Jerome H. Skolnick, *Justice Without Trial* (New York: John Wiley & Sons, Inc., 1966).

[11]See Anne Strick, *Injustice for All* (New York: Penguin Books, 1978); Alan M. Dershowitz, "U.S. Legal System: 'All Sides Want to Hide the Truth,'" *U.S. News & World Report*, August 9, 1982, pp. 62-63; and Marvin E. Frankel, "The Search for Truth: An Umpireal View," *University of Pennsylvania Law Review*, 123 (1975), pp. 1013-1059.

[13]See Stanley J. Lieberman, "A No-Lose Proposition," *Newsweek,* February 21, 1983, p. 14.

[14]See "Lawyers on Trial," *Newsweek,* December 11, 1978, pp. 98-100.

[15]Robert H. Aronson and Donald T. Weckstein, *Professional Responsibility in a Nut Shell* (St. Paul: West Publishing Co., 1980). The *Capital University Law Review* devoted an entire issue to lawyer competency and legal ethics (Volume 11, Number 3; 1982).

[16]See *USA Today,* February 15, 1983, p. 10A. A discussion of the proposed rules may be found in "Thou Shalt Not Go Public," *Time,* February 21, 1983, p. 58; "When Should Lawyers Blow the Whistle," *Newsweek,* February 21, 1983, p. 82; "Guilty Secrets Are Still Safe With Lawyers," *U.S. News & World Report,* February 21, 1983, p. 84; and Marvin Stone, "Are Lawyers So Special," *U.S. News & World Report,* February 28, 1983, p. 76.

[17]For a further discussion of the issues involved in legal ethics, see Monroe H. Freedman, *Lawyer's Ethics in an Adversary System* (New York: Bobbs-Merrill Company, Inc., 1975), and William H. Simon, "The Ideology of Advocacy: Procedural Justice and Professional Ethics," *Wisconsin Law Review,* 1978 (1978), pp. 30-144.

[18]John M. Levy, "The Judge's Role in the Enforcement of Ethics — Fear and Learning in the Profession," *Santa Clara Law Review,* 122 (Winter, 1982), pp. 95-116.

[19]"Civil Rights Attorney's Fee Awards in Moot Cases," *University of Chicago Law Review,* 49 (Summer, 1982), pp. 819-839. See also Stephen Gillers, *The Rights of Lawyers and Clients* (New York: Avon Books, 1979), pp. 195-205.

[20]"Crackdown on Judges Who Go Astray," *U.S. News & World Report,"* February 28, 1983, p. 42.

[21]See "We, the Jury, Find the . . ." *Time,* September 28, 1981, pp. 44-56; Jim Atkinson, "Cattle Call," *Texas Monthly,* September, 1981, pp. 208-214; and S. Sidney Ulmer (ed.), *Courts, Law, and Judicial Processes* (New York: Free Press, 1981), pp. 169-196.

[22]Harry Kalven, Jr. and Hans Zeisel, *The American Jury* (Chicago: University of Chicago Press, 1966).

[23]Mortimer R. Kadish and Sanford Kadish, *Discretion to Disobey* (Stanford: Stanford University Press, 1973).

[24]"The Right to Privacy of Prospective Jurors During Voir Dire," *California Law Review,* 70 (May, 1982), pp. 708-723.

[25]See "Making Discovery a Civil Procedure? Proposed Amendments to Rule 26 of the Federal Rules of Civil Procedure," *Arizona State Law Review,* 1982 (1982), pp. 725-746; Daniel Segal, *Survey of the Literature on Discovery from 1970 to the Present: Expressed Dissatisfactions and Proposed Reforms* (Washington, D.C.: Federal Judicial Center, 1978); and Robert E. Rodes, Jr., Kenneth F. Ripple and Carol Mooney, *Sanctions Imposable for Violations of the Federal Rules of Civil Procedure* (Washington, D.C.: Federal Judicial Center, 1981).

[26]Jethro K. Lieberman, *The Litigous Society* (New York: Basic Books, Inc., Publishers, 1981).

[27]For some recent articles on the exclusionary rule, see Pierre J. Schlag, "Assaults on the Exclusionary Rule: Good Faith Limitations and Damage Remedies," *Journal of Criminal Law & Criminology,* 73 (Fall, 1982), pp. 875-908; Gary S. Goodpaster, "An Essay on Ending the Exclusionary Rule," *Hastings Law Journal,* 33 (May, 1982), pp. 1065-1108; Joseph R. Weisberger, "The Exclusionary Rule: Nine Authors in Search of a Principle," *South Carolina Law Review,* 34 (December, 1982), pp. 253-272; "The Good Faith Exception to the Exclusionary Rule — Adoption by Williams and Richmond," University of Cincinnati Law Review, 51 (1982), pp. 83-94; Arval A. Morris, "The Exclusionary Rule: Deterrence and Posner's Economic Analysis of Law," *Washington Law Review,* 57 (November, 1982), pp. 647-667; H. Richard Uviller, "The Acquisition of Evidence for Criminal Prosecution: Some Constitutional Premises and Practices in Transition," *Vanderbilt Law Review,* 35 (April, 1982), pp. 501-526; "Is it Time for a Change in the Exclusionary Rule? *United States v. Williams* and the Good Faith Exception," *Washington University Law Quarterly,* 60 (1982), pp. 161-184; "The Fourth Amendment Exclusionary Rule: The Desirability of a Good Faith Exception," *Case Western Law Review,* 32 (1982), pp. 443-462; and Charles McC. Mathias, Jr., "The Exclusionary Rule Revisited," *Loyola Law Review,* 28 (Winter, 1982), pp. 1-12.

[28]See Harry A. Ackley, "Plain Talk About Plea Bargaining," Pepperdine Law Review, 10 (December, 1982), pp. 39-53; William F. McDonald and James A. Cramer, *Plea-Bargaining* (Lexington, Mass.: Lexington Books, 1980); Herbert S. Miller, William F. McDonald and James A. Cramer, *Plea Bargaining in the United States* (Washington, D.C.: Government Printing Office, 1978); National Criminal Justice Reference Service, *Plea Bargaining: A Selected Bibliography* (Washington, D.C.: Government Printing Office, 1980); and Michael L. Rubinstein, Stevens H. Clarke, and Teresa J. White, *Alaska Bans Plea Bargaining* (Washington, D.C.: Government Printing Office, 1980).

[29]Abraham S. Goldstein, "Defining the Role of the Victim in Criminal Prosecution," *Mississippi Law Journal,* 52 (September 1982), pp. 515-561; "Crime Victims Ask Their Day in Court," *U.S.*

News & World Report, February 7, 1983, p. 7; "Getting Status and Getting Even," *Time*, February 7, 1983, p. 40; and William F. McDonald (ed.) *Criminal Justice and the Victim* (Beverly Hills: Sage Publications, 1976).

[29]Gerald R. Miller and Norman F. Fontes, *Videotape on Trial: A View from the Jury Box* (Beverly Hills: SAGE Publications, 1979); Michael J. Weiss, "Trial by Tape," *American Film*, June, 1982, pp. 61-64; Lyle Dennison, "New Ally for Courtroom Cameras," *Washington Journalism Review*, 1982, p. 18; Dan Slater and Valerie P. Hans, "Methodological Issues in the Evaluation of 'Experiments' with Cameras in the Courts," *Communication Quarterly*, 30 (Fall, 1982), pp. 376-380; and *Psychology Today*, May, 1979, pp. 92-112.

[30]For a discussion of the role of state experimentation on cameras in the courtroom, see Stephen G. Thompson, "Electronic Media in the Courtroom: Some Observations on Federalism and State Experimentation," *Ohio Northern University Law Review*, 9 (1982), pp. 349-368. For a general discussion on the need to grant autonomy to state courts, see Shirley S. Abrahamson, "Reincarnation of State Courts," *Southwestern Law Journal*, 36 (November, 1982), pp. 951-972.

[31]See National Institute of Justice, *Perspectives on Determinate Sentencing: A Selected Bibliography* (Washington, D.C.: Government Printing Office, 1982).

[32]For a defense of the insanity plea, see Jonas Robitscher and Andrew Ky Haynes, "In Defense of the Insanity Defense," *Emory Law Journal*, 31 (Winter, 1982), pp. 1-60. See also "Bar Psychiatrists as Trial Witnesses?" *U.S. News & World Report*, 1982, pp. 57-58; "The Couch in the Courtroom," *Progressive*, August, 1982, pp. 11-12; and "Is the System Guilty," *Time* July 5, 1982, pp. 26-27.

[33]See Donald A. Marchand, *The Politics of Privacy, Computers, and Criminal Justice Records* (Arlington, Virginia: Information Resources Press, 1980).

[34]Hearings before the Committee of the Judiciary, United States Senate, *Reform of the Federal Criminal Laws* (Washington, D.C.: Government Printing Office, 1981)

[35]For a discussion of the role of the courts in the political process, see Robert J. Steamer, *The Supreme Court in Crisis* (Amhearst: University of Massachusetts Press, 1971). See also Richard Neely, *How Courts Govern America* (New Haven, Conn.: Yale University Press, 1981).

[36]See Thomas B. Marvell, "Appellate Capacity and Caseload Growth," *Akron Law Review*, 16 (Summer, 1982), pp. 43-99, and "Chief Justice Burger's Challenge to Congress," *U.S. News & World Report*, February 14, 1983, pp. 38-41. See also "Experts Split Over Plans To Ease Court's Burden," *U.S. News & World Report*, February 14, 1983, p. 41.

George C. Christie, "Vagueness and Legal Language," *Minnesota Law Review*, 48 (1964), pp. 885-911. See also Kenneth Culp Davis, *Discretionary Justice* (Urbana: University of Illinois Press, 1971).

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CHAPTER 4

A GUIDE TO RESOURCES

Many debaters and coaches believe that unless debaters have access to a law library, they cannot conduct research on a legal topic. Nothing could be further from the truth. There are numerous private and public organizations publishing materials on all aspects of law and crime. This chapter will provide a guide to finding some of those resources. This section has been divided into five sections:

I. Organizations
II. Indices and Government Publications
III. Reference Headings
IV. Periodicals
V. Specialized Libraries/Unusual Sources

I. ORGANIZATIONS

Anyone who can write a letter can find a wealth of information on the criminal courts topic. The organizations listed below conduct research, serve as lobbyists for changes in the criminal justice system, and prepare periodicals and other publications on topics related to the criminal justice system. For a complete description of the purpose and scope of research of most of the agencies and organizations listed below, consult the *Encyclopedia of Associations.*

Administrative Office of the United States Courts, United States Supreme Court Building, 1 First Street, N.E., Washington, D.C. 20544.

American Academy for Professional Law Enforcement, 444 West 56th Street, Suite 2312, New York, New York 10019.

American Bar Association, 1155 East 60th Street, Chicago, Illinois 60637.

American Civil Liberties Union, 132 West 43rd Street, New York, New York 10036.

American Enterprise Institute, 1150 17th Street, N.W., Washington, D.C. 20036.

American Judges Association, P.O. Box 1399, 188 Chestnut Street, Holyoke, Massachusetts 01040.

American Judicature Society, 200 West Monroe Street, Suite 1606, Chicago, Illinois 60606.

American Justice Institute, 1007 17th Street, Sacramento, California 95814.

American Law Officers Association, 100 Commerce Avenue, N.W., Suite 9, Washington, D.C. 20036.

American Society of Criminology, 1314 Kinnear Road, Columbus, Ohio 43212.

Americans for Effective Law Enforcement, 501 Grandview Drive, Suite 209, South San Francisco, California 94080.

Center for Constitutional Rights, 853 Broadway, Suite 1401, New York, New York 10003.

Center for Studies in Criminology, 3718 Locust Street, Room 203, Philadelphia, Pennsylvania 19174.

Committee for Equality of Citizens Before the Courts, 3401 West Division Street, Chicago, Illinois 60651.

Conference of State Court Administrators, National Center for State Courts, 300 Newport Avenue, Williamsburg, Virginia 23185.

Criminal Justice Statistics Association, 444 North Capitol Street, N.W., Suite 403, Washington, D.C. 20005.

Department of Justice, Constitution Avenue and 10th Street, Washington, D.C. 20530.

Fund for Modern Courts, 36 West 44th Street, Room 711, New York, New York 10036.

Institute of Judicial Administration, One Washington Square Village, New York, New York 10012.

Lawyers' Council for Civil Rights Under Law, 733 15th Street, N.W., Suite 520, Washington, D.C. 20005.

National Association for Crime Victims' Rights, P.O. Box 16161, Portland, Oregon 97216.

National Association of Criminal Defense Lawyers, 2600 South Loop West, Suite 320, Houston, Texas 77054.

National Center for Computer Crime Data, 2700 North Cahuenga Boulevard, Suite 2112, Los Angeles, California 90026.

National Center for State Courts, 300 Newport Avenue, Williamsburg, Virginia 23185.

National Center for Youth Law, 1663 Mission Street, 5th Floor, San Francisco, California 94103.

National College for Criminal Defense, P.O. Drawer 14007, Houston, Texas 77021.

National Council on Crime and Delinquency, Continental Plaza, 411 Hackensack Avenue, Hackensack, New Jersey 07601.

National Council of Juvenile and Family Court Judges (NCJFCJ), P.O. Box 8978, University of Nevada, Reno, Nevada 89507.

National Criminal Justice Association, 444 North Capitol Street, N.W., Suite 305, Washington, D.C. 20001.

National Forum on Criminal Justice, 1108 South Grand West, Springfield, Illinois 62708.

National Judicial College (NJC), Judicial College Building, University of Nevada, Reno, Nevada 89557.

National Law Enforcement Council, 1140 Commerce Avenue, N.W., Suite 804, Washington, D.C. 20036.

Vera Institute of Justice, 30 East 39th Street, New York, New York 10016.

II. INDICES AND GOVERNMENT PUBLICATIONS

As with any topic, policy changes are always being discussed, debated and passed. Debaters must remain current, and periodicals provide the means for doing so. Periodicals and journals on the criminal courts topic are located in two general classes of indices. The first includes indices which cover popular periodicals and journals in the social sciences. The second category is more specialized and includes law and criminology publications. The following is a list of popular periodicals and scholarly journals which will be useful on this year's topic.

A. Indices to Journals and Periodicals

1. *Reader's Guide to Periodical Literature*
   Indexes approximately 160 popular journals. It is the only index to popular news magazines.

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2. *Social Sciences Index*
   Beginning with publications in 1974, this index includes approximately 250 scholarly publications in anthropology, psychology, sociology, criminology, political science and geography. For articles published prior to 1974, consult *Social Sciences and Humanities Index.*
3. *Social Sciences Citation Index*
   One of the most complete indices to social science, the *Social Sciences Citation Index* indexes over 2,000 journals of international scope. It is more difficult to use than standard indices; but once mastered, it provides information not available in other sources. It is published in three volumes: Permuterm Subject Index, Source Index and Citation Index. The Source Index lists authors of articles using the key subject words in titles. By consulting the Source Index, a full bibliographic entry is found along with a list of articles footnoted by the author. The Citation Index lists all articles which cite the original source. If a researcher knows one major journal article, it is possible by using the Source and Citation indexes to locate dozens of other articles on a related subject.
4. *Public Affairs Information Service Bulletin* (PAIS)
   Indexes books, documents, pamphlets, reports of private agencies and journals in economics, political science and public policy. It is issued weekly.
5. *Index to Legal Periodicals*
   This is the only comprehensive index of legal periodicals and is usually found in law school or state law libraries. Since international law will be considered under this year's topic, debaters should be aware of it as a resource.
6. *Index to Periodical Articles Related to Law*
   Indexes journals not included in the *Index to Legal Periodicals.*
7. *Legal Bibliographies Index*
   Includes a list of bibliographies on subjects related to law. Gives addresses and titles of publications containing the bibliographies.
8. *Legal Contents*
   Is a biweekly publication which reproduces the table of contents of recent issues of major law reviews and journals.
9. *Current Law Index*
   Includes articles from 660 law periodicals.

B. U. S. Government Publications

Congressional activity will affect this topic less than it does most others. Federal court procedures are regulated by rules such as the Federal Rules of Evidence, the Federal Rules of Criminal Procedure, or Title XVIII of the U. S. Code which applies to criminal laws on a federal level. In order to do background reading on what the current procedures are as contained in these legislative acts and to remain current on possible changes in federal rules, debaters will need to read hearings and committee reports as well as the rules themselves. Since the Supreme Court dictates state court procedures through its interpretation of Constitutional rights, debaters will also need to be able to locate documents that relate to Court decisions. The following section lists titles and brief descriptions of government publications and indices. Most major university libraries are

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depositories for all U. S. government documents. Smaller college libraries and state libraries have limited collections of documents. Documents can be purchased through the Government Printing Office or at regional depositories.

1. *Congressional Record and Index*
   This is a daily publication which includes a text of floor debate in Congress. It is divided into four parts: Proceedings of the Senate, Proceedings of the House, Extension of Remarks, and Daily Digest of Activity in Congress. The Extension Section includes information which was not included in actual debate. Often such information is not relevant to legislation under consideration. Texts of bills and resolutions are usually not reported in the *Congressional Record.* The Daily Digest is useful to researchers in that it does include a list of bills signed by the President. The *Congressional Record* has an index which is published every two weeks and is compiled at the end of the year.
2. Congressional Hearings
   All expert testimony presented before a House or Senate committee or subcomittee is included in Congressional hearings. In using hearings, several steps should be taken to make efficient use of time and to record evidence properly. First, most witnesses have a prepared statement which is printed separately from the transcription of the presentation. Actual transcriptions usually include interruptions by and questions from committee members. Avoid duplicating research by reading both the testimony and prepared statement. Second, be sure to check the qualifications of the witness. They are usually given at the beginning of the testimony. Not all "expert witnesses" are really expert. Be certain of a witness's credentials before quoting him or her. Third, since committee hearings cover several days, be sure to include the actual date of the testimony rather than all hearing dates when preparing a heading for a quotation.
3. Committee Prints
   Often Congressional committees request additional information on a bill to supplement that provided in hearings. The results of such studies appear in committee prints.
4. Congressional Reports
   Committee reports or Congressional reports are most useful to debaters. Because they result from hearings and discussion on bills, they provide a legislative history or rationale for action. The *Serial Set* is the publication which includes reports and documents from the House and Senate. Included in the *Serial Set* are committee reports, reports of executive departments and investigatory bodies.
5. *Congressional Quarterly Weekly Report*
   This publication provides a weekly summary of Congressional actions. It includes discussion of the status and merits of pending legislation. It is indexed in the *Public Affairs Information Service Bulletin.*
6. *Weekly Compilation of Presidential Documents*
   Included in this publication are speeches, executive orders, proclamations, press releases and interviews. Each issue contains an index.
7. *United States Government Manual*
   This is the official government handbook. It provides information

about all executive, legislative and judicial agencies. It is especially useful to debaters because it lists addresses of agencies and subdivisions as well as brief descriptions of the agency's purpose and programs.

C. Indices to Government Publications

1. *Congressional Information Service* (CIS)
   Congressional publications including hearings (by witness, hearing subject and testimony subject), committee reports, and committee prints since 1970 are indexed. It does not include the *Congressional Report,* however. *CIS* has two parts, an index and an abstract. The index refers to the abstract and includes a summary of the publication and the SUDOCS number (the classification system used for government publications) under which it is filed.
2. *Monthly Catalog of United States Government Publications*
   This index contains all publications accessed by the Government Printing Office. Included are Congressional documents, reports, hearing, agency and bureau publications and executive documents. It is indexed by subject, author, title, classification number and series. Volumes issued prior to 1976 will not include all these indices, however. June and December issues contain half-year cumulative indices.
3. *Index to U.S. Government Periodicals*
   Includes 173 titles indexed including *The Advocate, FBI Law Enforcement Bulletin, Federal Probation,* and *Justice Assistance News.* All periodicals listed in the index are published by government agencies or departments.
4. *The Federal Index*
   Published monthly, beginning in 1978, this is an index to the following: *Congressional Record, Federal Register, Presidential Documents, Law Week* and the *Washington Post.*

D. Newspaper Indices

1. *New York Times Index*
   All articles appearing in the *Times* are indexed. Issued bimonthly and yearly, entries are listed by subject.
2. *The Wall Street Journal Index*
   This index is divided into two sections: corporate news and general news. It is issued monthly and indexed by subject.
3. Other Newspaper Indices
   a. *Christian Science Monitor Index*
   b. *Washington Post Index*
   c. *Newspaper Index* (includes *Chicago Tribune, New Orleans Picayune* and *Washington Post*)
4. *Facts on File*
5. *Editorials on File*

E. Abstracts

An abstract is a specialized index which contains a brief description of an article's content. Abstracts can save time for a researcher since only articles which appear to be appropriate need be located. There are several abstracts which should prove useful to debaters this year.

1. *United States Political Science Documents*
   This is an abstracting service for more than 120 American journals in the political and social sciences. Indexes begin with 1975 issues of journals.
2. *Selected Rand Abstracts*
   This publication abstracts Rand Corporation publications. The Rand Corporation is a quasi-governmental research agency which often publishes reports of interest to debaters.
3. *Economic Abstracts*
   Abstracts of books, periodicals and reports of governmental agencies and international organizations are included. It includes subject classifications related to international trade.
4. *Abstracts on Criminology and Penology*

F. Books

In addition to consulting the card catalogue, debaters should check the subject listing for *Books in Print, Forthcoming Books in Print* and *Paperbound Books in Print.* Given the international scope of this year's topic, the *International Bibliography of Political Science* should be consulted.

III. REFERENCE HEADINGS

Once the appropriate guides and indices have been located, the next step is to research articles, documents, and abstracts that relate to the debate topic. The headings listed below consist of very specialized categories like those found in legal indices as well as more general categories found in popular periodical indices.

Administration of criminal justice
Admissibility of evidence
Admissions
Arrest
Attorneys
Bail
Blood tests
Burden of proof
Capital punishment
Conflict of laws
Courts
Crime and Criminals
Crime and Punishment
Criminal investigation
Criminal law
Criminal procedure
Criminology
Cross-examination
District & Prosecuting attorneys
Due process of law
Eavesdropping
Entrapment
Evidence
Exclusionary rule

Expert witnesses
Federal Bureau of Investigation
Homicide
Impeachment of witnesses
Insanity
Interrogation
Judges
Judicial statistics
Juries
Jurisdiction (law)
Justice, Administration of
Juvenile Courts
Juvenile Delinquency
Law
Law enforcement
Lawyers
Legal aid
Legal immunity
Lie detectors
Organized crime
Plea bargaining
Pleading
Post-trial procedures
Pre-trial procedures
Privileges and immunities
Public defenders
Punishment
Restitution
Right to a fair trial
Right to counsel
Right to trial by jury
Search & Seizure
Self-incrimination
Sentencing
Speedy trial
Supreme Court
Trial practice
Trials
Venue
Witnesses

IV. PERIODICALS

As mentioned in the introduction to this chapter, law journals are not the only periodicals applicable to this topic. Popular periodicals have law-related articles, and there are several monthly and quarterly publications that most lawyers subscribe to or that undergraduate or community college libraries collect. Any university or community college offering a degree in criminal justice or related areas will have several of the periodicals listed below. Local police departments may also have some of the periodicals listed.

American Bar Association Journal
American Journal of Correction

American Law Journal
Case and Comment
Corrections Magazine
Corrections Today
Crime and Delinquency
Crime and Delinquency Literature
Crime and Social Justice
Criminal Justice Abstracts
Criminal Justice Newsletter
Criminal Justice Review
Criminal Law Bulletin
Criminologist
Criminology
Editorial Research Reports
FBI Law Enforcement Bulletin
Facts on File
Federal Probation
Issues in Criminology
Journal of Criminal Law and Criminology
Journal of Criminal Law, Criminology, and Police Science
Journal of Law and Economics
Law and Contemporary Problems
National Journal Reports
National Probation and Parole Association
Police Chief
Police Magazine
Prison Journal
Prosecutor: Journal of the National District Attorney's Association
Trial

V. SPECIALIZED LIBRARIES/UNUSUAL SOURCES

In researching a topic such as this, do not overlook the potential gold mines of information which individuals might have in their possession. For instance, city attorneys, county prosecutors, law enforcement agents, and local judges should have legal publications or copies of statutes which regulate court procedures in your state. Most attorneys, regardless of the size of the city in which they practice, subscribe to the state bar association journal, legal periodicals, and law journals. Consult these individuals and ask for assistance in locating information.

Law schools are not the only sources of law libraries. Small libraries are usually maintained in city and county court buildings as well as in state libraries located in the capitol. Colleges which offer criminal justice majors or similar law-oriented majors or paralegal institutes will also have sources available. Since many local community colleges offer associate degrees in criminal justice areas, they will have some of the publications listed in the periodicals list found in this chapter.

The following resources should also prove helpful:

Newsbank is a collection of nationwide newspaper articles and editorials available at some college libraries.

U. S. Government bookstores are located throughout the country. Check the *U. S. Government Organization Manual* for the bookstore nearest you. Call to find out which publications are carried.

CHAPTER 5

DEBATING THE JUSTICE SYSTEM: AN ANNOTATED BIBLIOGRAPHY

CIVIL PROCEDURE

"A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure," J. H. Friedenthal, *California Law Review,* Vol. 69, No. 3, p. 806.

This article traces the impact of recent Supreme Court decisions on federal law governing civil procedures.

"The Civil Investigative Demand — A Constitutional Analysis and Model Proposal," A. J. McFarland, *Vanderbilt Law Review,* Vol. 33, No. 6, p. 1451.

This article offers a model outlining investigative procedures in civil litigation.

"Civil Liability for Police Activities," Michael R. Smith, *Popular Government,* Winter 1980, p. 42.

Many argue that law enforcement personnel operate above the law. Smith discusses options that lie outside the criminal court system available to those who feel they have been mistreated by police.

Rules of Civil Procedure for the U. S. District Courts, House Judiciary Committee, August 1, 1982.

This document outlines the rules used in civil proceedings in federal courts as amended in 1982 in keeping with the findings of the Supreme Court.

"Trials Closer to Where They Hit Home," *Nation's Business,* October 1982, p. 50.

This article discusses a U. S. Senate bill to take more lawsuits against the government out of Washington, D.C., courts and to try them in federal courts around the country.

COURTROOM PROCEDURES

"Answer to Overcrowding: Short, Sure Sentences," *USA Today,* October 1982, p. 50.

All agree that court dockets are backlogged, resulting in long delays between arrest of suspects and eventual resolution of the case. This article proposes a solution to relieve the burden on courts.

Courts, Martin Shapiro, 1981.

This book provides a comprehensive discussion of the fundamental principles and foundations of the United States court systems and of foreign countries.

Legal and Legislative Information Processing, Beth Eres (ed.), 1980.

This collection of essays provides an examination of current and proposed techniques employed in information processing within and among legislative and judicial agencies of the government.

Videotape on Trial, Gerald R. Miller and Norman E. Fontes, 1979.

The authors reveal and explain their research findings from a Michigan study which investigated the unique effects of videotaped trials on legal communication and decision-making. The research concludes that the use

of videotapes during trials is a viable option, providing certain safeguards are followed.

The Courts: Fulcrum of Justice, Ted H. Rubin, 1976.

Though slightly dated, Rubin's book provides an excellent source for a background understanding of how American courts operate.

Courts: A Comparative and Political Analysis, Martin Shapiro, 1981.

Shapiro's book takes a philosophical look at the role that courts play in contemporary American society.

"Fourteenth Amendment — Cameras in the Courtroom: Supreme Court Gives the Go-Ahead," Joy D. Fulton, *Journal of Criminal Law and Criminology,* Winter, 1981, p. 1143.

Fulton argues that cameras should be allowed in the courtroom because there exists little evidence to suggest that a constitutional ban is justified.

"No Longer Best or Brightest," *Time,* November 29, 1982, p. 57.

This article argues that the Supreme Court of California, once considered a model for other state supreme courts, has deteriorated because of bad appointments and too much concern for politics. It outlines the danger of too much judiciary involvement in political issues.

"Unclogging the Courts: Chief Justice Speaks Out," *U. S. News and World Report,* February 22, 1982, p. 36.

In an interview, U. S. Supreme Court Chief Justice Warren Burger offers suggestions for how the increasing burden being placed on American courts can be relieved.

"Reforming the Court," William F. Buckley, *National Review,* March, 1982, p. 320.

Buckley argues that our courts are badly in need of reform, and suggests that more unified policies and practices would help the judiciary system to run more smoothly.

CRIME AND CRIMINAL PROCEDURES

Attorney General's Task Force on Violent Crime, Hearing before the Subcommittee on Criminal Law, House Judiciary Committee, October 23, 1981.

The subcommittee hearings considered the Reagan Administration's crime control program. This report includes statements exploring improved coordination between federal, state and local governments, proposals for criminal law reform, stiffer penalties for repeat offenders, and proposals for convict rehabilitation programs.

"Measuring Productivity in a Criminal Investigation Unit," J. Hardee, *Police Chief,* Vol. 48, No. 3, p. 34.

The author of this article offers a method of assessing the productiveness of police criminal investigators.

Improving Prosecution? The Inducement and Implementation of Innovations for Prosecution Management, David Leo Weimer, 1980.

This book examines theories behind current trends in criminal prosecution and how they are implemented.

Law and the Computer, Michael Gemignoui, 1981.

This book provides a compact treatment of the legal issues surrounding computer-age technology. The author defines common legal issues in conjunction with specific references to computer applications.

Juvenile Crimes Against the Elderly, Frank P. Morello, 1980.

This book takes a look at two specific segments of society: the young and

the old. It treats the problems faced by elderly persons who are victimized by juvenile delinquents.

"Foreword — The Morality of the Criminal Law: Rights of the Accused." David L. Bazelon, *Journal of Criminal Law and Criminology,* Winter 1981, p. 1143.

This article deals with the rapid rise in violent crime and some of the solutions that have been offered to the problem, particularly harsher penalties. Bazelon argues that more attention must be paid to the root causes of crime before any realistic, workable solution can be found.

"Fourth Amendment — Of Cars, Containers and Confusion," Jeffrey A. Carter, *Journal of Criminal Law and Criminology,* Winter 1981, p. 1171.

This article examines the inconsistencies that have characterized the rules and regulations for Fourth Amendment search and seizure policies. Carter argues that the Supreme Court, with inconsistent findings, has continually muddled Fourth Amendment policies.

"What Lockheed and La Cosa Nostra Have in Common: The Effect of Ideology on Criminal Justice Policy," Jay S. Albanese, *Crime and Delinquency,* April 1982, p. 211.

This article examines the attitudes and assumptions that undergird American law enforcement administration.

"A Management Plan: Effective Criminal Investigation," James K. Stewart, *Police Chief,* August 1980, p. 71.

This article proposes a management system for criminal investigation as a method for improving the operation of law enforcement in the United States.

"Civil Discovery of Criminal Investigative Files: Presumption of Confidentiality." John DiCicco and Douglas B. Lang, *Criminal Justice Quarterly,* Winter 1980, p. 160.

The authors are concerned with the confidentiality issues surrounding criminal investigations and the information they reveal. The article explores confidentiality as it applies to crime.

"Can White Collar Crime Investigators be Protected from Improper Pressure?" Ezra Scotland, *Journal of Criminal Justice,* Vol. 9 (1981), No. 4, p. 265.

Law enforcement personnel investigating white collar crime face unique situations due to the nature of the crime with which they work. This article deals with some of the pressures which they face, and looks at the potential impact that pressure can have on the investigation process.

"Arresting a Suspect in a Third Party's Home: What is Reasonable," Linda Imes, *Journal of Criminal Law and Criminology,* Spring 1981, p. 293.

While the law is clear on arrest procedures in their own home, arrest procedures in other people's homes raises other issues. This article outlines the unique privacy issues in such instances.

"Presumption of Innocence Needs Prompting," *Psychology Today,* June 1980, p. 14.

At the heart of the American court system is the presumption of innocence given to the accused. This article argues that that presumption is being eroded, and that it needs to be more carefully attended to in trials.

"The Politics of Crime," *Atlantic,* August 1982, p. 27.

Criminal justice system reform continues to be a political issue. This article looks at some of the political influences on criminal justice reforms.

"The Complex Minuet in Criminal Courts," *U. S. News and World Report,* November 1, 1982, p. 37.

This article provides a recent look at the state of American courts.

"TRB From Washington," *New Republic,* May 26, 1982, p. 4.

This article looks at the proposed Criminal Code Reform Act and offers a critical assessment of its proposals.

FEDERAL/STATE COOPERATION

Courts and Politics: The Federal Judicial System, Howard Ball, 1980.

This book, written for those without formal legal education, examines judicial review and the basic foundations of the federal court system. Included are structure and dynamics, along with models of the decision-making process at various levels of the federal court system.

"Burger: Federal Courts Mired in Trivia," *U. S. News and World Report,* January 12, 1981, p. 7.

Chief Justice of the U. S. Supreme Court, Warren Burger, argues that federal courts are becoming bogged down with cases that would more appropriately be dealt with in lower courts.

"There's Still Life Left in States' Rights," *Newsweek,* June 23, 1980, p. 88.

Although states' rights have ceased to attract much attention, this article points out that state courts are still a vital part of the judiciary system. The article highlights the impact of Supreme Court decisions on state courts.

Habeas Corpus Reform Act of 1982, Senate Committee on the Judiciary, April 1, 1982.

This document contains an analysis of the Reform Act, which would limit the power of federal courts to review state court criminal convictions.

"Efforts in Congress to Curtail the Federal Courts," *Congressional Digest,* May 1982, p. 131.

Concern over the power of the federal courts is evident in Congress. This article details the efforts of some Congresspersons to curb that power.

"Congress's Court Strippers," *Newsweek,* April 19, 1982, p. 67.

This article profiles some of those in Congress who seek to reduce the power of the courts, and the arguments they use to make their case.

INVESTIGATIVE PROCEDURE

"Report on Privacy: Who is Watching You?" *U. S. News and World Report,* July 12, 1982, p. 34.

This article examines the dilemma faced by criminal investigators who may encroach on the Constitutional right to privacy.

The Rights of Police Officers, Gilda Brancato and Elliot E. Potebaum, 1981.

This book, written from the perspective of civil liberties, explores what law enforcement officials can legally do while investigating crime.

Pressures in Today's Workplace: Oversight Hearings, House Committee on Education and Labor, Subcommittee on Labor-Management Relations, October 16-18, 1979.

These hearings address the concerns of investigation at the workplace and as a condition for jobs. The legality of such investigations becomes an issue for the subcommittee.

"Who Really Gets Stung? Some Issues Raised by the New Police Undercover Work," Gary T. Marx, *Crime and Delinquency,* April 1982, p. 165.

This article traces the impact of covert police operations with special attention to the negative impact such operations have.

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"The Criminal Investigation Process: Toward a Conceptual Framework," Jack Kuykendall, *Journal of Criminal Justice,* Vol. 10 (1982) No. 2, p. 131.

This article deals with criminal investigations in the abstract, looking at them theoretically.

"Hypnosis on Trial: A Practical Perspective on the Application of Forensic Hypnosis in Criminal Cases," Eric M. Alderman and Joseph A. Barette, *Criminal Law Bulletin,* January/February 1982, p. 5.

The authors of this article focus on the actual use of hypnosis in criminal courts. While many have speculated about how hypnosis might be used, this article concentrates on actual applications.

FBI Undercover Guidelines: Oversight Hearings, Subcommittee on Civil and Constitutional Rights, House Judiciary Committee, February 19-26, 1981.

These hearings focused on guidelines for covert investigative procedures in criminal cases. The document concentrates on the implications such procedures have on citizens' rights.

JUDGES AND JURIES

Criminal Justice Reform Act of 1982, Message from the President, House Committee on the Judiciary, September 13, 1982.

This document focuses on the President's message with regard to provisions which prevent the suppression of evidence obtained by police during criminal investigation.

Federal Rules of Evidence, House Judiciary Committee Print, August 1, 1982.

This document outlines changes in the rules of evidence for Federal courts as a result of action taken by Congress and the Supreme Court.

"Judges Bridge Politics and Law," *U. S. News and World Report,* November 1, 1982.

In American government, the operation of the judiciary is intended to be above politics. This article details the political involvement of judges.

Courts and Judges, James A. Cramer (ed.), 1981.

This book provides a comprehensive treatment of the role that judges play in the judiciary system.

"Suits Too Complex for a Jury," *Business Week,* September 22, 1980, p. 118.

This article outlines some of the more complicated civil actions appearing in courts. It suggests that for some, a trial by jury is not necessarily the best option.

"Putting Juries on the Couch," *New York Times Magazine,* November 28, 1982, p. 70.

This article deals with recent research into juries and their composition to help understand what and how they decide.

"Drive to Halt Tyranny of Judges," *U. S. News and World Report,* February 15, 1982.

It is the opinion of many observers that judges are exercising too much policy-making authority. This article looks at some of the arguments made by those who seek to curb the power of the bench.

"Mind Control in the Courtroom," *Psychology Today,* March 1982, p. 66.

Lawyers have long tried to "figure out" the prospective members of the jury, so as to choose those who might be disposed to favor their client. Now, they are turning to more effective means of learning much about the jury members. This article discusses a psychological approach to jury selection.

AMERICAN LEGAL SYSTEM

Courts, Law, and Judicial Process, S. Sidney Ulmer (ed.), 1981.

This book provides an overall view of the components of the American legal system and a discussion of how they are interrelated.

Courts of Appeals in the Federal Judicial System, Howard J. Woodford, 1981.

In this book, the author focuses on a particular segment of the judicial system and discusses it in some detail. The discussion provides a clear view of what goes on in Federal Appellate Court.

Why Justice Fails, Whitney N. Sanford, Jr., 1973.

Although dated, this book presents some of the glaring deficiencies in the American justice system at many levels. Written for a lay person, the book is very easy to understand.

Fundamentals of Legal Research, J. Myron Jacobstein and Roy M. Mersky, 1981.

This book is an excellent guide designed to serve as a basic text for students who are learning to do legal research. The book includes a glossary of terms essential to an understanding of legal publications.

"American Justice," *U. S. News and World Report,* November 1, 1982, p. 35.

This special section provides a very comprehensive, up-to-date discussion of the American court system, the problems it faces, and some of the reforms being sought.

Jurisdiction on Indian Reservations, Senate Select Committee on Indian Affairs, March 17-19, 1980, Vol. 2, August 11, 1980.

These hearings direct attention to the different jurisdictional questions raised by criminal investigations on Indian reservations, and highlight the different policies within the legal system.

RULES OF EVIDENCE

"Assaults on the Exclusionary Rule: Good Faith Limitations and Damage Remedies," Pierre J. Schlag, *Journal of Criminal Law and Criminology,* Fall 1982, p. 875.

This article provides a comprehensive discussion of the exclusionary rule in light of recent attempts to limit its use. The constitutional base for the exclusionary rule, as well as its implications for law enforcement agencies is also discussed.

"The Good Faith Restatement of the Exclusionary Rule," D. Lowell Jensen and Rosemary Hart, *Journal of Criminal Law and Criminology,* Fall 1982, p. 916.

The authors of this article argue that the exclusionary rule has been extended far beyond its original scope. They argue for moderation of the rule.

"Criminal Procedure Ombudsman Revisited," Robert P. Davidow, *Journal of Criminal Law and Criminology,* Winter 1982, p. 939.

Arguing that the only purpose of the exclusionary rule is to protect people, the author proposes that an ombudsman be established to handle appeals.

"Police Use of CCTV Surveillance: Constitutional Implications and Proposed Regulations," Gary C. Robb, *University of Michigan Journal of Law Reform,* Spring 1980, p. 571.

Whenever law enforcement agents use surveillance equipment, it raises issues relevant to constitutional guarantees. This articles looks at the use of closed circuit television and how it affects law enforcement.

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CHAPTER 6

BACKGROUND ON THE TOPIC SELECTION

Debate topics don't just pop out of the woodwork. Careful thought and deliberation by a large number of people lie behind each word and phrase included in the topics submitted to the schools of the nation each January for their vote. In fact, the delegates from each state attending the annual Topic Selection Conference commit two and one half days of work together, along with many hours of advance preparation, to develop specific propositions in three general topic areas. Each of these is judged capable of generating top quality debate if selected by the schools.

At the 1982 Topic Selection Conference on December 27-29, general topic areas considered included The American Legal System, Telecommunications, Immigration, Land Use and the American Environment, Reaganomics and Welfare Reform, Surveillance, Industrial Policy and Tax Reform. Immigration, The American Environment, and the United States Justice System surfaced at the end of the Topic Selection Meeting and went to the nation on the annual topic selection ballot. Of these, the United States Justice System has been chosen for interscholastic debate in 1983-84.

The purpose of this chapter is to review some of the thinking and discussion of the coaches who drafted the study report on Justice, the Wording Committee, which phrased the final topics presented to the Advisory Council for refinement and final selection, and the delegates from the states who placed the Justice problem area on the ballot as their top choice. While it is correct to believe that each person in the topic development process had reasons for selection of the various terms used in each proposition, it is incorrect to assume that any of these persons had a full grasp on all the potential implications and nuances of the words selected. To the contrary, the delegates to the Advisory Council, and especially the members of the Wording Committee, fully recognize that debaters and their coaches will uncover meanings, applications, and uses of terms which reach beyond anything foreseen by the framers of the propositions. While this makes participation in the topic development process somewhat risky, it is also a great stimulus for creativity and thoroughness by those who take the risk and get involved.

This year, the area of the U. S. Justice System received a great amount of attention by the submitters of the original study report, by the Wording Committee and by the delegates to the Advisory Council. Stevan Kalmon and Richard Nelson, both high school debate coaches from California, initiated the exploration of the problem area in 1981 under the title, American Legal System. The area was one of the final three choices voted upon by the states in 1982, coming in second to Military Policy.

The authors went back to the drawing board with their topic concept for the 1982 selection meeting. New analysis of the data and issues, consideration of the factors they perceived to have caused the negative response the area received from many coaches in the 1981 balloting, views of the researchers at the Congressional Research Service, and feedback from the 1981 Advisory Council provided the screens through which ideas for new propositions were sifted.

The authors' first conclusion was that the direction of the propositions

needed to be altered from 1981. Focus in that set of propositions was upon the practitioners in the U. S. legal system — the lawyers, the juries, the judges. In 1982, Kalmon and Nelson presented propositions pointed basically toward the process of justice in the United States, rather than upon the practitioners in the system. Propositions dealing with lawyers and juries were discarded early in subcommittee deliberations, with the authors' encouragement and with the judgment that such propositions might be too limiting for sustained good debate. It was also felt that many of the central issues related to the personnel in the justice system could readily be dealt with in propositions of larger scope dealing with procedural issues.

Secondly, input from the Congressional Research Service suggested that there was danger in focusing any proposition on procedures for attorneys. CRS suggested that tampering with procedures is dangerous for attorneys since procedures are so closely tied with a loss of rights, hence malpractice suits. On the other hand, the Wording Committee and Advisory Council felt debate in this area could be especially stimulating — touching the forbidden fruit in a sense — by directing debate toward an area not usually given consideration.

As the Wording Committee came to grips with specific propositions, the greatest deliberation went into Proposition #1. As submitted by the authors, this proposition stated: "Resolved: That uniform rules governing investigative procedures for all crimes should be adopted for all law enforcement in the United States."

The Wording Committee was first concerned that the inclusion of both "for all crimes" and "for all law enforcement agencies" made the proposition both too cumbersome and too narrow. The authors' interest here had been to cause debate on the procedure of investigation, wherever or whenever it might be used. In other words, they hoped for debate on a single set of procedural rules for using wiretaps, for example, whether they were used in dealing with organized crime, murder investigations, domestic violence, or any other criminal investigation. But the authors and the Wording Committee saw the burden on affirmatives as excessive under these terms and feared the result would be petty debate in which negatives would simply hunt for remote instances not covered by affirmative plans. The Wording Committee's suggestion was a revised proposition stating: "Resolved: That the United States should adopt uniform rules governing investigative procedures for all law enforcement agencies in the nation." When this proposition was considered by the Advisory Council, the Wording Committee's suggestion was endorsed. In addition, the Council felt the resolution wording would be more definitive if the term "criminal investigation procedure" was used and if the modifier "public" were added to the term "law enforcement agencies." Thus, the final Proposition #1 emerged, stating: "Resolved: That the United States should adopt uniform rules governing the criminal investigation procedure of all public law enforcement agencies in the nation."

Note should be given to the fact that in this proposition, "criminal investigation procedure" is a singular term. It was intended to refer to the overall scope of procedure used by public law enforcement agencies in the investigation of crime. The delegates foresaw debate in this area as including issues arising from criminal investigations, but not including penal reform, court proceedings, or questions of criminal or evidence law. Cases were expected to deal with such issues as wiretapping, use of informants, entrapment, double jeopardy, warrant standards, arrest discretion, search and seizure rules, press

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sources, lie detectors, *Miranda* rights, brutality and citizen review.

The delegates indicated that coaches in their states had encouraged consideration of both civil and criminal law propositions under this area. Therefore, the Wording Committee moved away from investigation procedures to select two similar propositions — focusing on court procedures, as the second and third options under the justice area. Proposition #2: "Resolved: That the United States should establish uniform rules governing the procedures of all civil courts in the nation," provides a topic option in the civil litigation arena. The intent is to aim debate toward issues in the process of litigation and not the grounds for suits or the basis for awards by the courts. Discovery, a federal code of civil procedure, jury selection, jury instructions, arbitration, pleadings, and statutes of limitations questions will provide a foundation for cases in this area.

Proposition #3: "Resolved: That the United States should establish uniform rules governing the procedure of all criminal courts in the nation," is the criminal area alternative to #2. Procedures in the operation of the criminal courts, specifically issues arising from criminal case proceedings and not including investigation or penal reform, are the intended focus of this proposition. Cases are expected to deal with discovery, pre-trial detention, speedy trial, venue, jury selection, jury instructions, a federal code of criminal procedure, media controls, protection of witnesses, sentencing, plea bargaining, etc. It is a proposition that broadens the options for debate beyond investigative procedures, to which #1 is limited, yet keeps a clear focus upon what happens within the workings of our criminal courts.

Use of the modestly nebulous term "United States" as the agent of change in each of the propositions was intentional. The delegates wanted debaters to have room for creativity in proposing both the specific source and direction for change, with the one provision in each proposition that the change establish uniformity of procedural rules in a specific area of our system of justice. This term also reflects the attitude of the delegates this year with respect to the overall scope of the topics. In recent years, there has been much discussion of excessively broad topics which seem to spawn the infamous "squirrel" cases. But this year's discussions were greatly tempered by the arms sales question being debated in 1982-83. There was substantial opinion that this topic was excessively narrow and that affirmatives had too few options to consider. Thus, with a view for better balance between affirmative and negative options, the delegates made a conscious effort to moderately broaden the propositions in all three areas included on the ballot for 1983-84. Using a flexible agent of change was part of this effort.

Undoubtedly, if the Wording Committee and Advisory Council had spent three, four or five days debating the propositions in the Justice, Immigration, and Environment areas, different propositions would have been on the ballot. But the preliminary deliberation process must stop somewhere and the creativity and investigative skills of debaters must be unleashed. The goal of the topic selection process and the hope of those involved in it is that the process produces topics of sufficient breadth and depth, worded with definable terms and inclusive of sufficient issues of significance to provide a top-quality forum for interscholastic debate. Beyond that, it is up to the debaters themselves to make or break a topic. Debaters should consider both what the propositions do and do not say. They should look at both the definition and the implication of the terms in the propositions. They should seek the skeleton of intent that each proposition structures, and then fill it in through their analysis and research.

Reprinted in its entirety is the study committee report submitted in September, 1982, and modified and presented in December, 1982.

THE AMERICAN LEGAL SYSTEM

"You are attempting to refute me in the rhetorical way, as they do in law courts. . . . But this sort of proof is valueless in the pursuit of truth."
—Socrates, in *The Gorgias,* by Plato

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REFORM OF THE LEGAL SYSTEM

Few social institutions must bear in so public and contentious a manner the strains of our society as our legal system. Whatever the activity or issue, disputes in this country inevitably, and usually quite laboriously, find their way into the courts. We expect the disputes to be resolved justly and expeditiously, with the wicked punished and the virtuous rewarded. When this does not occur, regardless of the reasons which bring the dispute into court or the social pressures involved, we blame the courts. Rising crime? Judges are too lenient, criminals too well protected. An epidemic of litigation? Lawyers are preying on a defenseless public. Delays and exhorbitant awards? The legal system operates without regard for the needs of either society or the individual litigant. In varying degrees, these and other complaints have validity. The American legal system badly needs improvement. And both the need for reform and the degree of public interest should make debate and discussion of this problem area very interesting and rewarding.

The Topics

The specific debate and discussion topics are listed later in the report. The proposed topics explore two basic areas of concern: (1) the process of bringing criminal and civil cases to the courts; (2) the legal practitioners who bring and administer the cases. While a number of additional areas might usefully be examined, the focus on these seems to provide the best combination of interest, research potential, manageable scope, and immediate importance for high school debaters.

1. *The Process* — Debate resolutions and discussion questions 1, 5, 6 and 7.

Court cases may roughly be divided into two categories, criminal and civil. While civil cases comprise the vast majority of court matters, criminal cases are usually the most noticeable.

"A crime is an act or omission prohibited by a statute enacted for the public's protection, the violation of which is prosecuted by the state in a judicial proceeding in its own name, and for which a fine or imprisonment may be imposed." (*The American Legal System: Concepts and Principles,* by David Eliot Brody, 1978, p. 288.) Criminal procedure included the proceedings which lead through criminal trials; but, since the prosecutor's agents (chiefly, the police) are public representatives, criminal procedure "also governs the permissible scope of police detection of criminal activity, the manner in which the police gather evidence against a suspect, and, if a defendant is found guilty, the manner in which punishment is imposed." (*American Legal System,* pp. 341-2.)

The FBI, which collects data on criminal and law enforcement activity throughout the nation, reported that during the 1970s violent crime, measured on a per capita basis, increased by more than five percent per year. Crime rate increases during 1979 and 1980 topped ten percent, though, perhaps surprisingly, the crime rate actually declined slightly in 1981. Despite the recent decline, one-third of all households in the U. S. is directly affected by some kind of serious crime each year. ("The Curse of Violent Crime," by Ed Magnuson, *Time,* March 23, 1981, pp. 16, 17, 21; "FBI Reports Says Crime Rate Dropped by Two Percent," *San Francisco Chronicle,* August 27, 1982, p. 8.) The criminal justice system, which exists to punish and help prevent this crime, is often blamed for much of the increase. Overburdened police and prosecutors obtain too few arrests (only 48 percent of reported rapes lead to arrest, only 15 percent of reported burglaries) and even fewer convictions. Trials are delayed (eight months on the average), mocking the defendant's right to a speedy trial and jeopardizing public safety when the accused is released on bail. Plea bargaining and judicial leniency reduce imprisonment (the 130,000 felony arrests in New York in 1979 resulted in 8,000 people going to prison). Perhaps most disturbingly, the justice system seems to encourage career criminality (half of all robberies, burglaries and rapes are believed to be committed by persons previously convicted of the same offense). ("Why the Justice System Fails," by Roger Rosenblatt, *Time,* March 23, 1981, p. 22.)

Legal matters which are not within the realm of criminal law are matters of civil law. The key distinction is the underlying purpose of the litigation. In criminal law, the state seeks to punish the defendant for a wrong committed against the plaintiff as a private citizen (or organization). (*American Legal System,* pp. 83-4.) Because the state is not generally involved in the civil plaintiff's preparations, civil procedure is limited to proceedings leading up to and including the trial.

The American Bar Association opined in 1980, "Many citizens and organizations are finding that the high costs and delays associated with litigation are denying them justice." An ABA survey in 1976 concluded that two-thirds of Americans lack easy access to courts because of complex legal procedures, long delays, and high legal fees. Depending on the state and local jurisdiction, the average delay between filing suit and going to trial is two to four years. The length of the trial itself has doubled in the last decade. ("With Justice Affordable For All, ' by Paul Nejelski, *Judges' Journal,* Summer, 1980, p. 4; "Equal Justice and the Problem of Access," by Senator Edward Kennedy, *Loyola University of Los Angeles Law Review,* June, 1978, pp. 485-6; "Our Judicial System Needs Help: A Few Inside Thoughts," by Judge J. Clifford Wallace, *University of San Francisco Law Review,* February, 1977, pp. 7-8.)

2. *The Practitioners* — Debate resolutions and discussion questions 2, 3 and 4.

The phrase "legal practitioner" usually brings to mind, for good or ill, lawyers. But the legal system has a much broader range of actors — judges, jurors, investigators, even paralegals, as well as the lawyers themselves. All of these play important roles in the execution of justice; and the manner in which they are selected, trained, and governed offers much for exploration.

In 1977 the leading legal directory in the United States, Martindale-Hubbell, listed about 450,000 lawyers; 65 percent of those were engaged in private practice. (*American Legal System,* p. 10.) How effectively or equitably they are engaged is a major source of concern. The cost of lawyers' services, efforts to

integrate paraprofessional assistance into law offices, methods of solicitation, the distribution of lawyers (both in terms of geography and specialty), and controlling ethics and malpractice are frequently cited as significant factors affecting the quality of American justice.

The nation's 20,000 judges are also frequently questioned with regard to fairness or competence. Chief among reform issues are admission standards, review, discipline, continuing education, specialization, and alternatives to full-dress judicial procedure and concentration.

The selection and use of juries is a third major source of attention and reform. The premise of the jury system — that a panel of private citizens should determine the facts of a law case — presents numerous difficult questions: How should jurors be selected? What educational or experiential qualifications should be imposed? Are certain cases or issues too technical, or emotional, for a jury to determine? Is a unanimous verdict essential — and, if so, a unanimous verdict of how many people? Answering such questions is as fundamental to the successful administration of justice as regulating the lawyers and judges.

PROPOSED DEBATE TOPICS

Problem Area — What Reforms Are Most Needed in the United States Legal System?

Discussion Questions —

1. What rules of procedure would be best for the investigation of crime by law enforcement agencies in the United States?
2. How can the use of juries in the United States judicial system be made more beneficial to our society?
3. What standards should the federal government establish for the legal profession in the United States?
4. What standards should the federal government establish for the judicial profession in the United States?
5. What changes in the structure of the court systems within the United States would be most beneficial to our society?
6. What changes in the procedure of law courts in the United States would be most beneficial to our society?

Debate Resolutions:

1. *Resolved:* That uniform rules governing investigative procedures for all crimes should be adopted for all law enforcement agencies in the United States.

   Intended scope: issues arising from criminal investigations; not to include penal reform, court proceedings, or questions of criminal or evidence law.

   Cases: Wiretapping, use of informants, entrapment, double jeopardy, warrant standards, arrest discretion, search and seizure rules, press sources, lie detectors, *Miranda* rights, brutality, citizen review.

2. *Resolved:* That the use of juries in the United States judicial system should be fundamentally changed.

   Intended scope: issues of jury composition, use, and guidance; not rules of evidence, substantive litigant rights, or other court procedures.

   Cases: Jury size, selection standards, verdict requirements, instructions, limitation of decision responsibilites, voir dire, arbitration, grand jury reform, grand jury abolition.

3. *Resolved:* That the federal government should establish uniform standards for the practice of law by attorneys in the United States.
   Intended scope: issues of admission to and performance of the legal profession, not questions of substantive litigant rights (other than the rights of action against members of legal profession).
   Cases: Qualifications, discipline, malpractice, privileges, services for indigents, costs/fees, legal clinics, advertising, ethics (conflict of interest, withholding of evidence, handling of funds, whistle-blowing on clients), paralegals, distribution (by geography and by specialty).

4. *Resolved:* That the United States should establish uniform rules regarding judicial selection and performance quality.
   Intended scope: issues of quantity and quality of judges; not court structure or specific judicial actions.
   Cases: Judicial qualifications, ethics, appointment vs. election, mandatory retirement, disciplinary procedures, appellate review.

5. *Resolved:* That the structure of court systems within the United States should be significantly changed.
   Intended scope: alternatives to establish jurisdictional boundaries and related changes in court personnel; not substantive legal rights.
   Cases: Appellate review jurisdiction and process, special courts, court availability, number of courts, arbitration, jurisdiction.

6. *Resolved:* That the federal government should establish uniform rules of procedure for all civil courts in the United States.
   Intended scope: issues in the process of litigation, not the grounds for suits or the basis of awards.
   Cases: Discovery, federal code, jury selection, jury instructions, arbitration, pleadings, statute of limitations.

7. *Resolved:* That the federal government should establish uniform rules of procedure for all criminal courts in the United States.
   Intended scope: issues arising from criminal case proceedings; not to include investigation or penal reform.
   Cases: Discovery, pre-trial detention, speedy trial, venue, jury selection, jury instructions, federal code, media controls, protection of witnesses, diversion, sentencing, plea bargaining.

NATURE OF DEBATE ON THE PROBLEM AREA

While an area of such breadth and technical complexity carries with it the risk that affirmative teams can find miniscule proposals which no one but a desperate first negative could dispute (for example, conference call hearings for minor procedural motions, or oral decisions by appellate courts for non-precedent cases), this problem area appears excellently balanced between affirmative and negative because its issues emphasize the persuasive abilities of every debater. Preliminary analysis indicates four factors which contribute to this result: the difficulty in finding concrete significance, the clash of values or societal priorities underlying most potential reforms, a large degree of change and experimentation occurring already, and a wide divergence of views on virtually all issues.

1. *Significance.* Neither side in a debate will find it easy to "put lives on the

flow" in a typical debate in this area, primarily because it will be very difficult to draw a direct plausible, link between specific reforms and a verifiable number of people affected. Even in the criminal justice topics, where the crime rate statistics are most tempting for affirmatives, concrete quantification will be difficult to substantiate. If, say, five percent of all murder acquittals occur in cases involving some exclusion of significant evidence, it is doubtful that an affirmative — even by eliminating the exclusionary rule altogether — will be able to "guarantee" convictions in those cases, much less assure a decrease in the number of murders. Too many factors intervene. Proving significance for a change in the jury numbers from twelve to six would be even more difficult. Likewise, negative teams will probably be unable to offer, except for standard spending arguments, disadvantages which end the world or destroy some lesser but specific number of lives. Instead, each side will need to use rhetorical ability to persuade judges that its somewhat subjective, or difficult to quantify, significance is paramount in the debate.

2. *Clash of values.* Most proposed solutions in this area are not based on social principles supported by clear consensus. Disputes about pre-trial detention and bail are an example: "One sound reason for a bail system is to avoid locking up anyone before he is proven guilty. But it is simply unrealistic to disregard the criterion of likely dangerousness, even though it raises serious constitutional questions." (*Time,* p. 23.) Most debates, especially in the criminal justice area, will likely involve some balance between the rights of litigants and the rights of society — putting the value of judicial expediency and societal protection in direct confrontation with the value of protecting individual liberty. (See, for example, "Trends in the Administration of Justice in the Federal Courts," by Judge Max Rosenn, *Ohio State Law Journal,* 1978, pp. 791-801, and "Adversaries, Juries and Justice," by Barry R. Grass, *Loyola Law Review,* Summer, 1980, pp. 525-565.) Few proposals in this problem area, therefore, will be properly considered without reference to underlying societal values.

3. *Change and Experimentation.* There are at least 153 laboratories for legal reform in the United States — 50 states, 92 federal districts, and 11 federal circuits. Any one or any group of these jurisdictions, or any social or legislative agency within them, may propose or attempt almost any reform; and probably every reasonable idea which affirmative teams may suggest has been tried somewhere — even telephone hearing and oral appellate decisions. In addition, the meddling nature of lawyers and the increasing concern about the legal system have prompted numerous commissions, legislative studies, and a broad range of experimentation.

Based on the recommendations of a presidential commission (*Los Angeles Times,* August 18, 1981), the Reagan Administration seeks a host of "conservative" reforms in the criminal justice system. Notable among the proposed changes are bail restrictions and elimination of the exclusionary rule (*San Francisco Chronicle,* September 29, 1981, p. 1). Even more radical changes were overwhelmingly adopted in California's Victims' Rights Initiative (June 1982). The American Bar Association, and most state bar associations, have a commission to study almost every aspect of legal concern, including, for example, the ABA's Action Commission to Reduce Court Costs and Delay (*Judges' Journal,* p. 47) and the ABA's five-year effort to revise its Model Code of Professional Conduct (*Los Angeles Daily Journal,* August 12, 1982). Proposals also come from influential individuals, such as the historic complaint by U. S. Chief Justice Warren Burger that one-half of the nation's lawyers are not co.npetent

to represent their clients (*Los Angeles Daily Journal,* August 17, 1982, p. 1) and the more recent reform ideas of Supreme Court Justices John Paul Stevens (more complete disclosure at the outset of litigation costs — *Los Angeles Daily Journal,* August 12, 1982) and Byron White (creation of a second Supreme Court — *Los Angeles Daily Journal,* August 11, 1982).

And innovations are attempted. Take the jury as an example. Most people assume that the standard rule of twelve jurors and a unanimous verdict is almost universal. In fact, almost every number between six and twelve is actively used in some U. S. jurisdiction, and each of these with variations on the proportion of votes required to reach a verdict. Even the point at which the "right" to a jury trial comes into being varies fairly broadly in different jurisdictions (*American Legal System,* pp. 103-5). All this activity should have a strong effect on questions of inherency and solvency; and the effect should basically be to encourage persuasive use of mixed evidence rather than to predetermine the outcome of fixed disputes.

4. *Divergence of Views.* Largely as a result of the factors discussed above, not to mention the disputatious nature of the legal enterprise, a diligent researcher will be able to find several legitimate (or at least legitimate-sounding) sources of information and opinion on each side of the major questions in this problem area — and probably most of the minor questions as well.

APPLICATION OF NUCEA CRITERIA

1. *Propositions.* Wording, intended scope, and sample anticipated cases for each of the proposed resolutions may be found in the report. In general, the topics are designed to be moderate in scope — not so narrow as to exhaust the available issues, but not so broad as to preclude meaningful debate. To that end the resolutions concentrate on reforms involving legal procedure, administration, and practice, rather than questions involving substantive law. Nonetheless, the large number of possible reforms and the potential for isolating relatively limited and technical reforms may create breadth and interest problems. This is a particular concern in the criminal investigation and law practice topics.

2. *Timing.* The court system presents issues both timely and timeless. Presidential crime commissions, bar association commissions, state legislatures, Congress, and numerous private lobbying groups consider legal process reforms continually. With attention focused on the nation's courts daily, whether regarding the unjustified relocation of a professional football team or the breaking up of the telephone monopoly, the court system is constantly in the public spotlight.

3. *Scope.* The topics generally allow for federal regulation of court procedure; but wording could easily be changed to provide for state action or a combination of the two. The terms "federal government" and "United States" are fairly interchangeable. Use of "United States" may allow the affirmative greater flexibility, with fewer Constitutional problems, as it could arguably include state action. Some resolutions might even work well at the state level. For example, topic 3 could read "That each of the United States should . . .," allowing for uniform action within each state, but not forcing national uniformity.

The words "uniform" and "all" are used to indicate universality of application, not comprehensivity of cases.

4. *Range.* The broad range of issues within the problem area should provide manageable work for all levels of debaters. Simpler questions, such as lawyer

qualifications, involve fewer issues than others, making them easier for beginning, exhaustive, legal research, perhaps making them attractive to serious, experienced debaters.

5. *Quality.* Aside from the obvious importance of the legal system to all Americans, the problem area presents a separate advantage in its qualitative nature. Many cases are philosophical, involving rights and justice, which might provide a respite from recent topics stressing quantitative matters. This advantage, however, may be lost if affirmatives concentrate on small-scale, isolated reforms.

6. *Materials.* Published material on the court system is voluminous. Weekly magazines, daily papers, and popular books treat the more common issues regularly. For some issues these sources can be quite sufficient. The federal and state governments publish reports, hearings, and legislative debates which frequently deal with the courts. Naturally, the legal publications deal extensively with legal issues, and debaters will find expeditions to law libraries fruitful (probably essential).

7. *Interest.* Certainly the legal system interests most people. This may be seen in the extensive press coverage and crowded law schools. Since the courts affect all our lives, both through civil and criminal proceedings, the issues in this problem area should prove interesting. As indicated in the previous analysis, the issues are quite varied, so they should hold the debater's interests, particularly as many of them are interested in legal careers themselves.

8. *Balance.* The analysis section outlines several reasons for believing that the topics would provide good debates Fundamentally, one can see a system based on deep-rooted traditions in which changes are being proposed and tried every day. Given such evolution, debaters will probably find that cases with tempting affirmative significance are also subject to strong attacks on grounds of inherency, solvency, or disadvantages.

9. *Correlation.* As noted previously, Congress, the legal practitioners, and the courts themselves constantly update the system. Thus, the year's academic debates may often echo the public debate.

10. *Value.* Sooner or later, nearly everyone comes in contact with the court system, either as a litigant, a juror, a witness, or a victim. Even to those who merely observe, the system has great impact on our everyday lives. Certainly a year-long investigation of the procedures involved in the system would have great educational as well as social value.

Exploration through debate and discussion of a given year's problem area should enrich the person involved. The topic itself, in addition to the forensic enterprise, should provide reward. The energy topic (1978-79) seemed to do this. It challenged the intellect with its technical issues; it could be observed tangibly by students in their real world; and it fired the imagination to a better future. The problem area of legal reform may have similar potential. The issues are often technically challenging, though not beyond the capacity of high school students to comprehend. The concerns are often immediate and tangible, particularly with regard to criminal justice questions; yet tangible considerations are balanced by the interplay of fundamental social values. Finally, the area is one which may appeal directly to the personal interests of students, since most of the same social, intellectual and psychological motivations that draw them to forensics also create a need for them to understand this crucial institution.

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CHAPTER 7

ARGUING TOPICALITY: PERSPECTIVES AND TECHNIQUES

During the past few years many collegiate and high school coaches and participants have expressed concern over the proliferation of affirmative case areas within seemingly definitive resolutions. There appear to be no limits to affirmative creativity. Hiding behind a shield of "reasonableness," many affirmatives — without a tinge of remorse or shame — devise and argue cases seemingly unrelated to the words of the resolution. Negatives, in response to this development, have increasingly abandoned case-specific refutation for the more utilitarian ground of generic counterplans and disadvantages. A myriad of "cures" have been proposed and/or adopted in an effort to ameliorate this problem.[1] Some of these proposals have merit. However, all of them are circuitous attempts to do what debaters should be able to do for themselves. The best solution is to arm debaters with the understanding, ability and inclination to effectively argue topicality in the round. In the last analysis, a good topicality argument is *the best defense* against the questionable affirmative case.

PART I: PROCEDURAL QUESTIONS

A clear understanding of what topicality is — and what it is not — is an important starting point en route to sophistication in handling this issue.

The Theory: Topicality as an Absolute Voting Issue

Topicality is an absolute issue in two different respects. First, it calls for a dichotamous judgment. Whereas most debate issues are resolved in relative terms, topicality is an all-or-nothing proposition. Either an affirmative case is topical or it is not.

> *. . . the basic judgment (concerning topicality) still remains an either/or. In fact this may be about the only issue left in debate calling for a dichotamous judgment.*[2]

In addition, topicality is one of the few issues that carries an absolute impact. If the affirmative loses the topicality issue, it must lose the debate. This absolute impact stems from the essential functions that this requirement performs. First, it provides the topic for discussion. Debate cannot take place without a topic to frame the nature of the dispute. Without it, the advocates would have no idea how to go about research and preparation, and the chances for an intelligent exchange would be limited. A second, but related, function of topicality is to divide the ground between the advocates. An agreement on topic *and* on the demarcation of terrain between the advocates — which presuppose an agreement on critical terms — are prerequisites to intelligent argument. Lionel Ruby notes that, "In order to have a genuine argument . . . there must . . . be a common understanding of the question to be answered."[3] Daniel McDonald adds that, "It is only when terms are defined and mutually accepted that you can begin marshalling evidence to prove something."[4] Topicality, because of the functions that it serves in competitive debate, remains an absolute issue.

Topicality, as an absolute issue, can be illustrated by the often-used judicial analogy. In judicial decision-making, "the Court should consider first in every case whether or not it has jurisdiction. If it does not, then it has no power to

decide the case on its merits."[5] The question of jurisdiction (a procedural issue) is considered independently from the question of case merit (a substantive issue). The analogy likens the role of the debate critic to that of the judicial arbiter, in that the resolution restricts jurisdiction. Thus, the issue of topicality must be resolved before substantive issues can be considered.

The judicial analogy, however, has its shortcomings, of which negative advocates must be aware. First, although the practice of determining the jurisdictional question before evaluating substantive claims is common to judicial procedure, it is not an absolute principle. "Occasionally, as in *Marbury v. Madison,* consideration of the jurisdiction issue will be 'postponed' until after the substantive claims have been considered."[6] Second, the issue of the court's jurisdiction seems laden with subjectiveness, much like the issue of topicality. As Barrett observes:

> *An "activist" Court seeking to expand the application of certain constitutional doctrines is more likely to construe justiciability limitations narrowly in order to reach the merits of cases; a Court interested in "retrenchment and consolidation" is more likely to construe justiciability limitations broadly in order to avoid reaching the merits of cases.*[7]

Even a generally "restrictive" Court occasionally asserts broad jurisdiction. The Burger Court, for instance, acted on the abortion front, reversing previous reluctance to act on politically sensitive issues.[8] Thus, negative advocates must exercise caution in invoking the judicial analogy; it can be used to justify both restrictive *and* expansive topic interpretations.

The Reality: Topicality Carries An Affirmative Bias

Negative advocates who have attempted to defeat well-prepared affirmative debaters on the issue of topicality know that it is not an easy task. The reason — aside from the fact that the negative must win the issue on the affirmative's ground, (i.e., the affirmative will usually defend the topicality of its position with case-specific arguments and evidence; by contrast, the negative will usually attempt to adapt generic arguments and evidence to the affirmative's case), and is usually not prepared to do so — is that topicality carries an affirmative bias. Two factors are responsible for this bias. First, the affirmative has been granted the right to define terms. Second, with topicality, in large part as a result of the maxim that, "He who advocates must prove," presumption rests with the affirmative. These factors, however, do not pose inherent limitations for the negative. In fact, an understanding of these limitations can assist the negative advocate in coping with them.

The affirmative has been granted the right to define terms. This does not mean that the affirmative is free to adopt Humpty Dumpty's dubious linguistic approach, as when he told Alice, "When I use a word, it means just what I choose it to mean — neither more nor less." The negative retains the right to challenge the affirmative's definition(s).

> *The affirmative team has the responsibility for establishing the basis of argument and for defining the terms of the proposition. The negative team reserves the right to challenge any affirmative's definition. . . .*[9]

The affirmative's right to define terms is defended on two grounds — the first, pragmatic; the second, analogical. At first glance, the pragmatic basis appears reasonable. The affirmative is charged with the responsibility of defending the resolution; it must present an interpretation of the resolution in the first constructive speech; therefore, the affirmative ought to be able to define the terms, as a part of the justification for its interpretation. Furthermore, if the negative were given the right to define the terms of the resolution,

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no affirmative would be topical, since it would be to the negative's advantage to interpret the resolution in the most restrictive manner possible so as to exclude any affirmative position. Of course the converse is also true. It is in the affirmative's best interests to interpret the resolution in the most expansive manner possible so as to justify their own position and to limit negative ground. This is precisely what affirmatives have been doing — and with great success.

> *The affirmative team has the main advantage. It is their affirmative case, they will have researched all the appropriate and justificatory definitions, which they will claim to be reasonable and, less [sic] there be any doubts in the mind of the judge, will set up standards of reasonableness so specific and well-developed as to minimize the impact that any negative spontaneity will allow. And ultimately they will claim their inherent and God-given right to define the terms. They are, after all, the affirmative team. Is it any wonder the affirmative team will usually win these rounds?*[10]

The affirmative's right to define the terms of the resolution is also based on a legislative process analogy. According to the analogy, authors of a bill have the right to define the critical terms of the legislation so as to clarify its intent; thus, affirmative advocates should have the right to define the important terms of the resolution. But, this analogy contains a serious flaw. The proper corollary to the authors of a legislative bill would be the framers of the resolution — not the affirmative. The framers, after all, wrote the resolution, much as the authors wrote the legislation; the debater merely represents the resolution. Nonetheless, it can be argued that, even as "mere" representatives of the resolution, the affirmative should be able to define the terms, since an advocate for legislation would have more right to define its application than others would have.

The second reason that topicality carries an affirmative bias is the locus of presumption on this issue; it rests with the affirmative. Two warrants underpin this claim. First, an affirmative can invoke a court analogy. Since legislation is presumed to be constitutional until such time that it is effectively challenged in the courts, affirmatives claim that their plan should be presumed to be topical. However, as with most analogies drafted in the defense of topicality, this parallel has its deficiencies. In the first place, the proper comparison involves the determination of jurisdiction, not constitutionality, and courts do not presume jurisdiction is proper. Furthermore, a presumption of constitutionality could be grounded on assumptions peculiar to the legislative process. For example, the legislature may have debated the constitutionality of the legislation in question prior to approving it. Competitive debate, in contrast, affords no arena for a prior discussion of topicality.

The second warrant for affirmative presumption on topicality concerns fairness within the debate context. Since the negative is afforded general presumption, the affirmative should be granted the right to define terms, including the presumption that its definitions are topical. Yet, this hardly seems appropriate. The affirmative already enjoys the right to determine the focus of discussion under the resolution, which constitutes a substantial tactical advantage. Indeed, if fairness is important, then presumption on topicality should be granted to the negative as a form of corrective measure. After all, the broad resolutions of recent years, coupled with expansive affirmative interpretations, have expanded affirmative terrain at the expense of negative ground, and have placed unreasonable preparatory demands on negatives.

The presumption that the affirmative is topical may carry one of two different implications. The first, in simple terms, is that in the event of a tie, the affirmative is topical. Thus to overcome presumption, it is not enough for a negative advocate to cast some doubt — stalemate — on the topicality of the

affirmative's plan; instead, the negative must win the argument conclusively. The affirmative clearly benefits from this notion of presumption, since establishing non-topicality beyond a doubt is an almost impossible feat against a well-prepared affirmative.

A second possible implication of affirmative presumption on topicality is less troublesome for the negative: the affirmative is presumed topical until a substantial argument is raised to the contrary. In other words, the negative cannot simply challenge — or press — the affirmative's topicality, but must instead develop a substantive position. Once this is done, however, then presumption is, for the moment, militated. If a comparison is made to questions of constitutionality, this second view of presumption would be more accurate, since a statute is presumed to be constitutional only until it is challenged; at that point presumption is irrelevant. Negatives should seek to restrict the affirmative to this conception of affirmative presumption on topicality, since it is quickly neutralized.

The Plan is the Repository of Topicality

In order to ascertain topicality/non-topicality, look to the plan, not the advantages. Implicitly or explicitly, the resolution calls for action, not for the advantages of that action. Thus, it is the plan which fulfills the wording of the resolution; the advantages provide justification for the resolution. As a result, *any* affirmative advantage which results from the adoption of a topical plan/plan plank can be advanced as a potential benefit of the resolution.

Whereas non-topicality charges the affirmative plan — in toto — as falling outside of the confines of the resolution, extra-topicality may concede that the affirmative's plan overall may be topical, but parts of the plan are not. Extra-topicality thus zeroes in on specific portions of the plan, insuring that an affirmative does not go above and beyond the limits of the resolution.

Extra-topicality is one of the most misunderstood arguments in contemporary debate. Perhaps the best way to understand extra-topicality is to recognize what it is not. First, like non-topicality, it is concerned with the affirmative's plan; not with its advantages. Under this year's "uniform rules and procedures" resolution affirmative plans must focus on appropriate activities which occur *within* criminal courts. By contrast, affirmative advantages can — and usually will — focus on a myriad of activities which occur *outside* of criminal courts. The affirmative's plan mandates must be topical; its advantages must flow from topical plan mandates, but may concern any number of possible content areas. For example, bail procedures affect criminal activity, sentencing affects prisons, the exclusionary rule affects police practices, the insanity plea affects the mental health care system, diversion affects community life, and so on. The plan is the repository of topicality. The negative must search for extra-topicality — and non-topicality — in the affirmative's plan. Extra-topicality is a valid charge *only if* a portion of the affirmative's plan is not topical.

Second, extra-topicality is not concerned with the "enabling provisions" of an affirmative's plan. Affirmatives are allowed to include provisions which "enable" the plan to function, i.e., concerning administration, finance, enforcement, etc. Such plan features are not topical in their own right, but are essential to the mandate of the resolution. As such, they are legitimate.

> *Extra-topical provisions which are intended only as aids in the enforcement or implementation of the entire plan are legitimate and do not compromise the legitimacy of the affirmative solvency."*

The difficult question is when an enabling provision crosses the fine line which separates it from an illegitimate, and extra-topical, plan plank. A useful criterion, although it too is subjective, is whether or not the affirmative derives a benefit from the disputed provision. According to this view, the distinction that separates enabling provisions and extra-topical plan plank is equated to the difference between workability and solvency. Workability concerns the plan's capacity to function or operate; solvency deals with the capacity of the plan to produce benefits. A plan provision, though non-topical, is legitimate if it contributes to workability; it is illegitimate if it contributes to solvency. The concept of benefits includes *more* than simply the advantages that are claimed on the case. Cole Campbell elaborates:

> *. . . because the advantage or need which is voted on at the end of a debate is that which survives significance challenges, inherency arguments, solvency attacks, and disadvantages, the fact that the degree of ultimate significance is directly linked to extra-topical provisions which limit the impact of potential disadvantages seems to indicate that these extra-topical disadvantage preemptions in the plan to produce the affirmative advantage or need.*[12]

Thus, the notion of benefits entails the case advantages, and *much more!* The concept includes the aggregate of affirmative impacts, regardless of the origin. Thus, preempting a disadvantage contributes to affirmative benefits, and, if accomplished via a non-topical plan provision, should be considered to be illegitimate.

There is substantial disagreement with regard to the impact of extra-topicality. How should the critic treat an extra-topical plan provision? One possible course of action is to "throw out" the offending provision, in addition to any affirmative benefits which it accrues. This assumes, of course, that severability is a legitimate debate tactic (an issue that cannot be developed adequately within the context of this article). A second option is to retain the provision within the plan, but discount any affirmative benefits which stem from the extra-topical plank. The most drastic option is to "throw out" the entire plan. Negative advocates can defend this position based on the principles of statutory construction, as suggested by the Supreme Court decision in *Carter v. Carter Coal Company:* if one portion of the statute is found invalid (unconstitutional), then the entire statute is declared void. These options are, of course, debatable. The impact of extra-topicality is grounded in the principles of statutory construction and review.

PART II: TOPICALITY STANDARDS

The standards of topicality function as perceptual lenses for evaluation of this argument genre. The standards underpin the evaluation, and thus play an integral role in determining the outcome of a topicality argument. A debater's success in arguing topicality presupposes a mastery of the standards.

Framework for Standards: Reasonableness Versus the Better Definition

While the standards underpin an evaluation of topicality, they do not function in a vacuum. In order to evaluate standards of topicality, a perceptual framework is required. That framework is as integral to the evaluation of the topicality standard as the standard is important in determining the outcome of the specific topicality argument. Indeed, there are some theorists who advocate the institutionalization of a particular perceptual framework as the most effective restraint on affirmative case choice. Hence, "reasonableness," the

once-unchallenged and still dominant paradigm, has been challenged by "the better definition" paradigm; the latter has been endorsed by the National Debate Tournament Committee at the college level.

The framework of reasonableness, however, remains the most popular. It is based on the presumed value of variety as a source of educational enrichment in academic debate, and on the ambiguity of the English language. This latter justificaton is more compelling.

> *Words are but symbols to express ideas, and they always take on the meaning that custom and usage dictate. Hence, they are almost always of uncertain content and meaning, and are, therefore, open to interpretation.*[13]

As a result of this ambiguity, there is no one "correct" interpretation of the resolution. Thus reasonableness is a vehicle to evaluate the various interpretations that might be presented. Lichtman, Rohrer and Corsi offer this explanation:

> *Since most debate resolutions can be defined in various ways, the affirmative definition need only be a reasonable one. It need not be the only reasonable definition or even the definition that most readily springs to mind when scanning a proposition. Any affirmative plan that fulfills the criteria set forth by any reasonable interpretation of a debate resolution is legitimate, for affirmation of that plan would logically entail affirmation of the debate resolution.*[14]

Reasonableness gained wide acceptance during the past decade, attaining a consensual position as the framework to guide the evaluation of topicality. Parson verifies its dominance:

> *Nearly every debate text written suggests that the affirmative present a reasonable definition of terms. The criterion for establishing terms is reasonability, the same standard used for evaluating how well they were developed and defended.*[15]

Yet, the framework of reasonableness poses its own ambiguity. What does it mean to be reasonable? The term itself defies a precise definition.

> *The term "reasonable" is a factual expression not ascertainable by reference to rule, law or formula, and is not subject to exactness of definition.*[16]

> *What is reasonable depends on a variety of conditions and circumstances. It is an elastic term which is of uncertain value in a definition.*[17]

Indeed, Cyril Smith of Dartmouth College, debating in the final round of the 1981 National Debate Tournament, provided a definition of reasonable which unmasks the term as a tool by which the affirmative can justify any approach. "What does reasonable mean? *Oxford English Dictionary* in 1973: 'Reasonable: . . . agreeable to reason; not irrational, absurd, or ridiculous.'"[18] This prompted James J. Unger to observe that, "One man's reasonability is another man's irrationality." He continued:

> *It [reasonability] is far too vague and lacking in substance to offer anything more than a set of individualized, biased, and even emotional standards which must vary from judge to judge, debate to debate . . . reasonability as a limitation upon definitional excess is both ineffective and counterproductive.*[19]

The "better definition" alternative was initially offered as a superior standard of topicality. Yet, it is more than a standard; it is a vehicle to facilitate the evaluation of competing standards. The perspective is best described by Unger, in his words:

> *". . . in order to defeat the topicality of the affirmative approach the negative must be prepared to engage in a three-step process. (a) The negative must offer a clear alternative definition of terms or a clear alternative standard of application of same. (b) The negative must demonstrate the superiority of its interpretation to that of the affirmative. This would be accomplished through a two-fold process of comparison. First, the relative linguistic and policy support which each approach commands would be assessed . . . Second, the relative forensic support available must also be*

assessed . . . (c) The negative may be called upon to demonstrate that the affirmative plan cannot comfortably fit under its own definitional approach. Once having accomplished all three of these steps the negative may legitimately claim that for the purposes of this debate the affirmative case no longer meets the terms of the resolution as most accurately therein interpreted, and thus it should be rejected."[20]

There are two ways to view the relationship between "reasonableness" and "the better definition." One way is to consider the two to be competing perspectives to facilitate an evaluation of standards of topicality; they are alternative lenses for the viewing of standards. The other way is to view the latter as a refinement of the former; the "better definition" is a means to direct and shape the notion of "reasonableness."

Evaluation of Specific Topicality Standards

A debater's success in arguing topicality presupposes a mastery — entailing both understanding and application — of the various standards of topicality. Nine specific standards will be described and evaluated at this time.

Each Word Is Important

Each word plays a unique role in interpreting the resolution. Despite its shortcomings, the topic selection process (collegiate and high school) attempts to insure that each resolution is the product of substantial research, thought and deliberation. Thus, the framers of a resolution would select each word with care, each placed within the resolution for good and sufficient reason. As a result, an interpretation of the resolution must neither ignore any word, nor render two or more terms redundant.

The interpretation must preserve a discrete meaning or functioning for each term. The presumption is that the resolution is a well-written sentence and that each word in the sentence is there for a reason, that each word further refines the meaning of the sentence. Hence, any interpretation which ignores the existence of one or more terms or which renders two or more terms redundant is not a reasonable interpretation because it is not contextual.[21]

This standard, however, contains two limitations. First, it does not necessarily suggest that each word serves an independent *limiting* function, since this is only one facet of giving meaning. This caveat, however, takes the punch out of this standard. In addition, the requirement that each word be given meaning contradicts the essence of contextuality, an embodiment of two subsequent standards. If a phrase is greater than the sum of its parts (the thesis of contextuality), then each term does not play an independent role; indeed, the sum of the definitions of each of the individual words may contradict the contextual meaning.

Definitions of Individual Terms Must Not Contradict

Terms may not be defined to mean opposites. This may appear to be hard to do, but it is an all-too-common mistake, especially when an affirmative utilizes its plan to illustrate its interpretation of the resolution. Any time an affirmative proposal contains provisions which accomplish opposite objectives, and those provisions illustrate one of the terms of the resolution, then the affirmative is guilty of this mistake. For example, on the 1981-82 high school, "establish minimum educational standards" topic, it was common for affirmatives to establish, and to disestablish, standards in the same plan, thus utilizing the term "establish" in contradictory fashion.

This is not a reasonable practice, for several reasons. First, it is important to be able to evaluate the topicality of individual plan planks. The plan is not implemented as the net result of the separate planks; on the contrary, each

plank is implemented to comprise the whole. Evaluation of extra-topicality presupposes the distinctness of individual plan planks. Second, negative ground is lost. If the affirmative can disestablish and establish or curtail and increase, then it has rendered the all-important "action word" in the resolution to be all-inclusive. The result is that the negative has lost the ground that exists opposite the mandate of the resolution. Finally, in those topics that call for a "significant" action, i.e., "significantly increase," or "significantly curtail," etc., the term "significant" cannot be evaluated. Thus it becomes impossible to deduce the net result of the plan's mandate.

Grammatical Structure

Interpreting the resolution involves more than simply determining the meaning of individual words. The resolution, much like any sentence, must be understood in terms of its grammatical structure, as Brigham concludes.

> *It is not prescriptive rules which determine the relationship between the word and the thing signified, but it is the place the word occupies in the grammatical structure of language which gives meaning to words.*[22]

If the grammatical structure were rearranged, an entirely different meaning would result from precisely the same words. It is the arrangement of words which produces meaning; change the arrangement, and a different meaning results.[23] Thus, the grammatical pattern of the resolution must be maintained and strictly observed in order to derive the correct meaning from the words which constitute that pattern. In this fashion, the grammatical structure acts as a limitation on the possible interpretations of the resolution.

This is especially true of modifiers. "The modifiers don't change the relation of the headword to the rest of the basic pattern, but they do change and restrict its meaning in a variety of ways."[24] Given the role that modifiers play in determining meaning, negative advocates will want to carefully scrutinize affirmative interpretations for possible misuse. For example, in the resolution, "That the United States should establish uniform rules of procedure for its criminal courts," the placement of the words "uniform" and "criminal" in the sentence indicates their function: both are modifiers of particular terms. The term "uniform" modifies "rules of procedure," whereas the word "criminal" modifies "courts." Hence, the affirmative must, on the one hand, ground its mandate in the benefits of "*uniform* rules of procedure," and on the other hand, restrict its interpretation to "*criminal* courts." These two modifiers restrict — if moderately — the meaning of the resolution.

Another possible grammatical error involves the misclassification of the words of the resolution, i.e., using a noun as an adjective, etc. The proper classification of words cannot always be determined by viewing the word apart from its use in a sentence, because the English language includes many words which, when used differently, belong to two or more classes.

> *None of these word classes are entirely stable. That is, some items are not always in the same word class. Words are always slipping out of one word class and into another . . . nouns often become verbs, adjectives become nouns, proper nouns become common nouns, pronouns become nouns.*[25]

Jerome Frank refers to the false assumption, that each symbol has but one use, as the "one-word, one-meaning fallacy."[26] It is only when words are placed in a sentence that proper classification is possible. As Roberts observes, ". . .words in our sentences are marked in some way as one class or another. They may be marked by something in the word itself, or by structure words that accompany it, or by the position in the sentence."[27]

While grammatical requirements limit the possible affirmative interpretations of the resolution, they leave ample room for creative maneuverability. "A simple grammatical structure can express very different meaning relationships. . . ."[28] Indeed, the possibilities are almost limitless.

> *If we count the number of senses of all the lexical terms in an ordinary sentence of 15 or 20 words and compute the total number of possible combinations that could be formed from them when they are paired up in accord with the grammatical relations of the sentence, the number of possible senses usually runs into the hundreds. Since no sentence of a natural language has anywhere near this many different senses, and some have none at all, a rather severe form of selection must be going on in the process of producing derived meanings.*[29]

Thus, standards of topicality must be sought beyond grammatical requirements.

Context of Word Use and Phrasing

The context of word use and phrasing serves as an ideal complement to grammatical structure. Context implies that a phrase is greater than the mere sum of its individual parts. "The meaning of doubtful words," Robert Covington observes, "may sometimes be determined by reference to other associated words and phrases."[30] Words change their meaning as context varies; hence dictionary definitions of individual words may or may not reveal the optimal interpretation of those words in a debate resolution. In some cases individual definitions may even distort meaning, as Campbell warns:

> *In unabridged dictionaries, every conceivable definition of a word may be included. The tenth or twentieth definition of a word may be so obscure that it is unreasonable in a debate context.*[31]

The context of word use and phrasing clarifies the meaning of important word groups, such as "minimum educational standards," "uniform rules of procedure," "foreign military commitments," "mass media communication," and "foreign trade policies," and of the resolution itself. This notion of context is supported by semanticists and debate theorists.

> *Interpretation must be based, therefore, on the totality of context.*[32]

> *Defining words in the absence of context is very unsatisfactory as words may have different meanings in different contexts.*[33]

> *If we sever an utterance from its particular conditions and use it under any conditions or a condition which does not belong to it, we may produce nonsense.*[34]

Respecting the phrasing of the resolution by placing the individual words in the context of the words surrounding them is a reasonable — and not an onerous — requirement. After all, it may serve to *restrict, or* to *enlarge,* meaning.

> *Where any particular word is obscure or of doubtful meaning taken by itself, its obscurity or doubt may be removed by reference to associated words, and the meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used.*[35]

One troubling question, however, comes to mind: What is the origin of a contextual definition? The answer, of course, lies in the patterns and usage of individual words.

Context of the Field

The context of the field assumes that meaning is field dependent; that words and phrases are best interpreted by experts in the field or discipline where the words are commonly used. Hence, the "powers of labor unions" should be determined by labor relations' experts, "foreign military commitments" by

foreign policy and military specialists, "minimum educational standards" by educational theorists and practitioners, "arms sales" by munitions experts, "uniform rules of procedure for . . . criminal courts" by legal scholars, and so forth. Parson describes "field context" in these terms:

> *. . . common meanings often arise in fields or disciplines where the terms have been used. When debaters ignore the meanings of these fields and create new meanings, ones not recognized by the field where the term is commonly studied, the affirmative loses the grounds for claiming that they are reasonable.*[38]

Debate critics, in particular, often give more credence to definitions which originate in the literature of the problem area. Cole Campbell elaborates:

> *Some judges are particularly impressed by definitions which come from "the literature"; that is, definitions which have been formulated and expressed in the literature addressing the problem area. Professionals and government officials have more familiarity with the problem area and their definitions are often given more weight because of this familiarity.*[39]

This is a natural bias since "real world" decision-makers, whether a part of private or public institutions, rely heavily on field experts for definition and for amplification.

Some go beyond simply claiming that field context is a useful standard for evaluating topicality; they maintain that the strict adherence to field is essential to the health and vitality of competitive debate. Their position is persuasive. It is harder to justify this activity to educational decision-makers, topic experts or the general public when the actual content of debates bears little resemblence to the anticipated content, based on intuitive and/or informed judgments with regard to the field presupposed by the resolution.

Field context is not unreasonably confining. The definitions of experts in a particular field often vary considerably — sometimes more than standard dictionary definitions. On any question — and in any field — one is sure to find disagreement among theorists and practitioners. But these definitions at least come from someone knowledgeable in the field and familiar with the usage of that term.

"Common Sense" or "Reasonable Person"

The "common sense," "common usage," or "reasonable person" standard is grounded in ordinary language and interpretation. Richards notes that, ". . . the fundamental connections which can be used in definitions are limited to those which the normal mind can think of when directly named."[39] Once again the judicial system offers a parallel. The language of judicial opinion, according to Brigham, "operates on the same principle as ordinary language — that use is the bedrock of meaning."[39] In fact, the courts define "reasonable" in terms of "what is ordinary usage and common experience."[40]

However, incorporating this perspective into a standard of topicality does not produce a restrictive standard, since all that is excluded are the most extreme definitions. In addition, this standard is extremely vague. Who is the "reasonable person"? What is "common sense" or "common usage"? How is the standard to be used in defining the terms of the resolution? It is obviously difficult to defend this particular standard in a debate round. Unless the debater cited the results of public opinion data or semantic surveys, he could not defend the superiority of one definition over another. Furthermore, it is unclear whether this standard is even appropriate for academic debate. Debate is, after all, an esoteric activity, utilizing terms and concepts which are not known to the "common man." Indeed, debate is an elitist activity. It draws upon this

nation's best *young* minds, turns those minds loose examining the intricacies of complex economic, political and social issues, and then trains them to think and communicate under the most extraordinary circumstances. To expect debaters, following months of research and preparation, to utilize a "common sense" or "reasonable person" standard is itself unreasonable.

Must Not Delimit

One of the most important functions — *perhaps* the single most important function — of a debate resolution is to distinguish affirmative from negative ground. Since the total available terrain is a constant, its division is a zero-sum affair; any increase in affirmative ground can only result from a comparable decrease in negative ground, and vice versa. Hence, the issue of limits is important, and one standard for evaluating topicality is that an affirmative interpretation of the resolution must not delimit. Campbell concurs:

> *The proposition's function is to limit the discussion in debate to a given problem area. If a definition of the proposition fails to uphold that function by making the proposition so broad that it lacks any realistic limits . . ., that definition is unreasonable.*[41]

In other words, the affirmative's interpretation should not be so broad so as to be meaningless. Yet, this is subjective. First, *all* definitions inherently limit. The correct question is whether a particular limit is reasonable. This question cannot be answered, however, without relying upon other standards, thus robbing this standard of its independent value. In addition, the affirmative may limit the resolution to all but one interpretation. This is a limit, but it is meaningless.

The superior means of determining whether an affirmative interpretation adequately limits is to examine the remaining negative ground, based on the rationale provided above. An affirmative interpretation must leave the negative with adequate ground, measured in terms of strategic options. If, for example, an affirmative definition makes it impossible to counterplan, that definition must be suspect. It is an essential element of fairness that the negative should be able to choose among various strategies in opposing the topic. The affirmative has the advantage of focusing the resolution; the negative deserves an opportunity to oppose the resolution in the manner it chooses.

Direct Versus Indirect (Effects) Topicality

The affirmative must be directly topical, but this does not preclude claiming topicality from effects of the plan. All topicality is by "effects": no plan itself embodies the resolution — only the legal *effect* of the plan does. The critical distinction is not between direct topicality and topicality by effects, but rather between direct and indirect effects: legitimate topicality is by direct effects. Justice Sutherland explains the difference in the *Carter v. Carter Coal* case:

> *Whether the effect of a given activity or condition is direct or indirect is not always easy to determine. The word "direct" implies that the activity or condition invoked or blamed shall operate proximately — not immediately, remotely, or collaterally — to produce the effect. It connotes the absence of an efficient intervening agency or condition.*[42]

Thus, direct and indirect effects might be illustrated, as follows:

DIRECT EFFECT

Step one (PLAN) ..... Step two (TOPICAL RESULT OF PLAN)

INDIRECT EFFECT

Step one (PLAN) ..... Step two (RESULT OF PLAN)
Step three ..... (TOPICAL RESULT OF PLAN)

A few examples illustrate this point further. On the "arms sales" topic, an affirmative plan could stop the sale of AWACs to Saudi Arabia; the effect of the plan would be to significantly curtail arms sales. On the "curtail the power of labor unions" topic, an affirmative plan could require that non-union laborers be allowed to work in union shops; the effect of the plan would be to curtail the powers of labor unions. On the "uniform rules of procedure for . . . criminal courts" resolution, an affirmative plan could completely eliminate the admissibility of evidence obtained via wiretapping; the effect of the plan would be to establish uniform procedures for criminal courts. These are examples of plans that are topical by direct effects. Since the effect follows automatically from the plan, one need only examine the plan to ascertain whether or not it is topical.

Indirect effects, on the other hand, cannot be deduced from the plan: the presence of an intervening agency or condition requires proof that the effect will occur. For example, an affirmative plan may require cross-district busing; but to prove that minimum educational standards are established, the affirmative must first demonstrate that the quality of education in those schools will improve — the intervening condition en route to proving minimum educational standards. Or, an affirmative may require all law schools to establish — and test for — minimum competencies (in ethics, client sensitivity, oral advocacy, and other areas) as a prerequisite for graduation. The plan would alter lawyer preparation. However, even if "uniform rules of procedure" can be defined as "minimum standards" (there is evidence to bolster this claim), the affirmative must first prove that lawyer competence will increase — the intervening condition en route to minimum standards.

Indirect effects constitutes a bogus affirmative topicality claim for a variety of reasons. First, topicality loses its a priori station. The use of indirect effects subordinates topicality to other issues in the debate. In many instances, as in the examples above, the outcome of topicality argumentation becomes dependent on the outcome of affirmative significance claims. Topicality thus becomes an uncertain issue, wholly dependent on the proof of other issues which admit degree.

Second, indirect effects delimit, thus restricting negative ground. If providing an indirect effect or securing an advantage is what makes an affirmative topical, affirmative ground expands significantly. Although it is quite unnecessary given the breadth of the "uniform rules of procedure for . . . criminal courts" topic, some creative debaters will concoct various circuitous rationales to increase affirmative latitude. An affirmative could legalize marijuana, arguing that the effect of this action is to establish uniform rules of procedure for criminal courts since possession and use of marijuana would no longer constitute an offense. Such an interpretation significantly enlarges affirmative terrain on this topic. An expansion of affirmative ground, of course, restricts negative options. Where topicality stems from achieving an indirect result or gaining an advantage, then a negative counterplan which achieved the same end would be topical as well — regardless of the method. This problem is especially acute this year. Because of the breadth of the resolution, coupled with the absence of definitive limiting terms, i.e., no agent or method is specified in the wording of the resolution, negative ground is tenuous at best. One negative counterplan option

concerns the abolition of the adversarial system for particular categories of criminal offenses. If this ground is usurped by affirmatives, few negative generic options remain.

Finally, extra-topicality would become a moot issue. The topicality of portions of the plan would be irrelevant. All that would be required is that the plan produce a topical result; an affirmative could choose to include provisions in its plan, without regard to their topicality.

Yet, there is another side to this story, which maintains that much of the rhetoric in condemnation of "topicality by effects" is grounded in exaggeration. First, the position against it is a classic example of the "worst case" scenario. Instead of basing its charge on the actual examples presented by the affirmative, the negative uses the most extreme examples. It is perhaps unwise to penalize moderately restrained affirmatives on the basis of the hypotehtical possibility of abuse.

> *The argument urged from the possibility of the abuse of the revising power is . . . unsatisfactory. It is always a doubtful course to argue against the use or existence of a power, from the possibility of its abuse.*[43]

Second, the negative must be able to clearly demarcate direct effects and indirect effects. This is quite difficult. Finally, debate resolutions increasingly fail to distinguish whether the topical result is to stem from direct effects or indirect effects. Instead, resolutions are worded as statements of increment or degree, mandating an undefined movement in the pursuit of a nebulous goal.[44] Contemporary resolutions tend to mandate incremental effects, a simple increase or decrease in: "foreign military commitments," "the power of labor unions," "arms sales" (of the United States), etc. The "establish uniform rules of procedure for . . . criminal courts" resolution fits this pattern. No agent is specified. Furthermore, the resolution's action mandate, "establish," can be defined in one of three ways: to create something new,[45] to secure or to make firmer,[46] or to recognize an existing situation.[47] Our debate resolutions used to require that specific agents take definitive steps; no more. The affirmative should be held to the words of the resolution, and nothing more.

Intent

The final standard for the evaluation of topicality is the intent of the framer(s) of the resolution. The collegiate and high school resolutions are composed by topic committees, distinct entities which utilize a common process consisting of research, deliberation, refinement and adoption; in the final stage debate coaches choose among those topics which survive the initial screening. The topic committee *does make* assumptions about the meaning of a resolution during the screening phase. The intent standard holds that those assumptions ought to serve as a guide for debaters in interpreting the resolution.

Intent serves as a useful guide to interpretation in other arenas. A strict constructionist would argue, for example, that the framers' intent ought to be the basis for interpretaton of the Constitution of the United States. Indeed, sometimes intent is superior to exactness when it comes to the interpretation of law.

> *The courts . . . by "scrupulousness to the written word," had at times so interfered with the intention of the statute makers that the courts fell under public suspicion, and recourse was had, excessively, to administrative agencies.*[48]

> *. . . some judges . . . sabotaged legislative purposes by sticking to the exact words of statutes.*[49]

There is, however, an important difference between the judicial arena and competitive debate: judges have the legislative record to facilitate their determination of intent; such is not the case in debate.

[Editor's note: See Chapter 5 which is a legislative record of sorts.]

The intent of the framers of the proposition is not general public information and should not, in any event, influence the debating of the proposition.[30]

At this time there is simply no objective means of determining the intent of the framers of the resolution. Collegiate debate has found parameters to be of little assistance in this regard. Furthermore, the framers aren't clairvoyant; they function with a limited sense of possible affirmative interpretations; hence, there is *no intent* in many instances.

Frequently, the ambiguity does not result from careless draftsmanship, but from the fact that it is impossible to anticipate with precision the multitude of particular circumstances which later arise. . . .[31]

It is when coaches and debaters begin to probe the topic beyond the surface exploration of the framers that questions of interpretation arise for which intent can offer no assistance.

In addition, intent is not always the guiding light for judicial interpretation. *Lochner v. New York* stated that, "the purpose of a statute must be determined from the natural and legal effect of the language employed. . . . [32] This seems less arbitrary, since interpretation is based on objective wording rather than subjective guesstimates of intent. Campbell concurs:

The topic means what it says, and to impose any arbitrary limits or distinctions concerning what it says in order to reflect the "spirit of the resolution" is to be unreasonable.[33]

Finally, the judicial analogy suggests that determination of intent is an active, not a static, process. Intent must be interpreted over and over. Frank observes that, ". . . all the law is judge-made law. . . The courts put life into the dead words of the statute."[34] Carried one step further, this notion supports the on-going determination of intent by debate critics in round upon round of competition. In short, the intent of the resolution is determined by the debate community itself.

PART III: DEBATING TOPICALITY

Topicality is perhaps the most difficult issue in competitive debate for the individual participant to master. Understanding topicality is the first important step; debating topicality is the second step. The latter involves research, argument construction, effective utilization of topicality standards, strategy and refutational techniques.

Preparation

The first step in preparing to debate topicality involves research. The most effective topicality arguments are grounded in well-researched definitions. Where do you find them? An obvious starting point is the dictionary. Then examine encyclopedias, which contain more substantive definitions. The *International Encyclopedia of the Social Sciences* is especially useful. This source, and other similar publications, use articles by authors in the field to define them. Another useful aid is a thesaurus or dictionary of antonyms and synonyms. This has drawbacks, however, because the terms of the resolution are often defined by synonyms which themselves must be defined. Finally, look for legal definitions. Since topicality bears a resemblance to the judicial practice of

interpreting statutes, court definitions may be quite appropriate. Legal definitions may be found in *Black's Law Dictionary, Words and Phrases, Corpus Juris Secundum,* and by scrutinizing individual court cases.

The type of definitions noted above are general in nature; they do not consider the field or context in which they are used. To find definitions which are context-specific, look for specialized, or "topic-specific" dictionaries. They are extremely useful, though not available on every topic.

Finally, and most important, substantive definitions are found in the general research. These are perhaps the best definitions. They often are field specific and include clarification. For example, on the "uniform rules of procedure for . . . criminal courts" resolution, the *Georgetown Law Journal* publishes an annual comprehensive review of all published criminal procedure decisions." This project classifies all specific procedural issues under generic headings, including "investigation and police practices," "preliminary proceedings," "trial," "sentencing, parole and probation," "review proceedings," and "prisoners' rights." This constitutes an excellent contextual interpretation of the phrase "criminal procedure."

Once topicality research has netted definitions, they must be integrated into well-constructed arguments. This should be done prior to entering into competition. Initially, it is important to note the essential ingredients of a topicality argument. First, standards for evaluating topicality should be delineated. Absent such standards, the critic judge has no basis to select one definition over another. The standards underpin the evaluation, and thus play a critical role in determining the outcome of a topicality argument. It is important that the negative provide this criteria for evaluation. Second, the negative must demonstrate that the affirmative's interpretation fails to meet, or violates, the standards. The first and second steps must be well integrated. It does not do much good to present standards if the reasons as to why the affirmative is not topical are not grounded in those standards. Needless to say, these reasons must be carefully articulated. Finally, a mention of the impact of the topicality argument is warranted, though it need not be elaborate.

The next step is brief construction. Before the season is underway it is difficult to anticipate how affirmatives will be interpreting the terms of the resolution; in turn, it is difficult to construct topicality arguments claiming those interpretations are unreasonable. Initially, then, topicality must be approached generically. Research of definitions will result in some general distinctions that can serve as the basis for early topicality arguments. These positions should be constructed into initial briefs. Of course, topicality arguments are the most effective when they are tailored to specific affirmative cases. Thus, the initial briefs must be constantly revised in order to accommodate specific affirmative nuances.

When constructing topicality briefs, it is important that each concept be fully developed; this presupposes the use of clear explanations. These explanations should be written into the brief verbatim, and not left to an extemporized reconcoction during a debate round. Topicality arguments, by their very nature, involve substantial intricacy; concise and clear explanation is crucial to their success.

Strategic Considerations

A handful of strategic considerations are important once the negative debater enters the round.

First, the negative advocate must be reasonable in handling topicality. When should topicality be argued? Certainly *not* against every case, or even most cases. Overusing topicality saps its potential as a voting issue. Also, topicality arguments which have limited applicability to a particular affirmative approach lack credibility. When topicality is argued, the setting should be appropriate and the issue should be pursued seriously; in short, the argument should apply and it should be properly developed and extended. Finally, the topicality argument itself should be reasonable. Standards that are too restrictive, so that practically no affirmative could meet them, are not received well. Indeed, an otherwise unreasonable affirmative interpretation may gain credibility as the result of unreasonable negative standards.

Second, optimize the use of topicality standards. Apply them in the course of answering individual affirmative responses. And, support them with cogent reason and illustrative examples. "Tag lines" do not constitute effective extension.

Third, respond systematically to each and every affirmative answer as substantively as possible. Affirmatives usually provide numerous responses but rely on a limited number of *quality* responses to topicality; they rely on the inability of the negative to systematically take out *each* of their responses, in hopes of using the missed responses later in the debate. Be especially wary of certain types of affirmative responses. Often affirmative advocates will exploit analogies to broaden the topic, give them presumption, or violate one of the negative's standards. As has been emphasized previously, analogies usually suffer various shortcomings, which can be used to refute them. Also, it is common for an affirmative to claim that the resolution is worded badly; hence, the fault for broad interpretations is the framers, not the affirmatives. The negative must nonetheless insist that the responsibility for a reasonable interpretation of a "flawed" resolution remains the affirmatives. Campbell concurs:

> *If a proposition is poorly worded, the participants in debate should attempt to interpret the proposition in such a way that it adheres to the purpose and function of a proposition as discussed . . . limiting interpretations. . . .*[14]

Also be wary of affirmative claims of presumption. This claim has some validity; for example, the affirmative does enjoy an original presumption, in that a case is presumed to be topical until the negative argues to the contrary. However, any claims of presumption which extend beyond this initial assignment are dubious, as previously indicated. If the affirmative can claim that, if topicality is close at the end of the round, the affirmative should be presumed to be topical, then the negative will seldom win a topicality argument. Indeed, there is a strong case to be made, grounded in the judicial analogy, that, if jurisdiction is in doubt, presumption should lie with the more restrictive interpretation.

> *Some judges say that when doubt exists whether a statute was meant to be broadly construed, the safer and appropriate course is for the court to construe it narrowly. . . .*[15]

At the minimum, the negative must limit affirmative claims of presumption.

The negative must also be alert to claims that liberal definitions are superior because they enhance the educational value of debate. The educational value of debate is the most likely to flourish when an essential fairness is observed; this is not possible with broad interpretations that reduce negative ground and make research burdens onerous. Furthermore, a distinction must be made between breadth and depth. Broad interpretations may enhance the educational value of

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debate by expanding the breadth of discussion that is permitted within the resolution; however, broad interpretations may impair the educational value of debate by reducing the depth of discussion that is possible on any single case variant within the resolution. Breadth and depth stand in a trade-off relationship.

Finally, the negative must be prepared to deal with the affirmative claim that, "We're reasonable; that's sufficient." As previously indicated, this, indeed, is *not sufficient.* When the meaning of "reasonable" is grounded in the lowest common denominator, i.e., "not irrational or absurd," it ceases to be a compelling justification. Parson concurs, noting that: "Few terms have been butchered in debate as the term 'reasonable.' Whether the term can survive depends in large part on regaining its meaning."[8]

The fourth strategic consideration concerns the optimal speech for the original presentation — and extension — of the topicality argument. If the argument is lengthy, extendable and an important element in the negative's attack, it should be originally presented in the first negative constructive speech and extended initially in the second negative constructive. If the argument is to be presented in the second negative constructive speech, or, if it is to be presented in the first negative constructive and extended in first negative rebuttal, then the original argument should be short and relatively simple. The success of a topicality argument rests on the negative's ability to extend it well. Thus, the negative must assure sufficient time to answer each of the affirmative responses. Originating a topicality argument in the first negative constructive and extending it in the second negative constructive can exert tremendous pressure on a first affirmative rebuttalist; it pulls the speaker off first-line blocks; it requires thought and substantial preparation time. This strategy is most effective when the first negative constructive speaker initiates enough of the argument so as to elicit the best affirmative responses, and the second negative constructive follows with systematic, on-point, substantive extension.

CONCLUSION

As noted previously, debate resolutions divide affirmative and negative ground. Since the total available terrain is a constant, its division is a zero-sum affair; any increase in affirmative ground can only result from a corresponding decrease in negative ground. One thing is unequivocal: over the last few years affirmative terrain has expanded, and as a result, negative ground has contracted. Negative debaters can respond to this development in one of two ways. They can settle for the ground that the affirmative has left them, and place more and more emphasis on spurious counterplan and disadvantage positions. Or they can restrict affirmative latitude and reclaim lost ground by mastering the topicality argument. Clearly, the latter course holds more promise.

NOTES

[1]Collegiate debate initiated the use of parameters; but parameters failed to restrict — and sometimes expanded — the terrain claimed by the affirmative. The 1981-82 collegiate resolution was, "Resolved: That the Federal Government should significantly curtail the powers of labor unions in the United States." Further clarification of the intent of the framers is provided in the parameters which accompanied the topic ballot. The parameters stated, in part, that: "This policy proposition calls for the Federal Government to impose significant, direct legislative limits upon the authority and/or influence of labor unions in the United States." While the provision for "significant, direct . . . limits" appeared designed to limit affirmative approaches based on "effects," the

reference to "authority and/or influence of labor unions" accomplished the opposite purpose.

The National Debate Tournament Committee adopted two changes to take effect beginning with the 1983 NDT. First, topicality *is* a voting issue; whether it is or is not will no longer be the focus of debate during a round. Second, a "better definition standard" will replace the traditional "reasonability standard" as the appropriate lenses for the evaluation of topicality during a round. The "better definition" is that definition which is superior in analytical and evidential support, drawn from the relevant subject matter area, as introduced in a particular round. See, "Minutes," National Debate Tournament Committee, Thursday, April 1, 1982, Tallahassee, Florida, attachment.

One theorist claims that the fault lies with the topic selection process — that an effective topic selection process ought to include provisions for: careful study; pre-testing; and informed decision-making. In response to this recommendation, both collegiate and high school decision-makers have taken preliminary steps to improve the topic selection process. See, Michael Pfau, "A Proposal to Alter the Current Topic Selection Process," a paper presented to the Speech Communication Association Convention in San Antonio, Texas, November 11, 1979. Also, reprinted in *Debate Issues*, V. 13, No. 7 (April 1980), pp. 2-4, and V. 14, No. 8 (May 1981), pp. 6-9.

A second theorist argues that, since both affirmative and negative advocates have a vested interest in the definition of terms (the former seek definitions that expand affirmative terrain; the latter desire definitions that constrain it), this responsibility ought to be exercised by the topic's framers. See, Thomas Kane, "The Question Is Who Is To Be Master," a paper presented to the Speech Communication Association Convention in Anaheim, California, November 14, 1981.

Finally, waiting in the wings, a new wave of "judge interventionists" would encourage critics to take matters into their own hands by rejecting those affirmative positions which they perceive as "unreasonable" — regardless of the arguments presented during the round. The "judge interventionist" position was advanced in various forums during the 1981-82 debate season, including: the National Debate Tournament Committee open meeting on February 12, 1982, in Evanston, Illinois; the District IV NDT open meeting on March 3, 1982, in Mankato, Minnesota; and at the Anaheim and Evanston NDT Committee official sessions.

[2]Donn W. Parson, "On 'Being Reasonable': The Last Refuge of Scoundrels," *Dimensions of Argument: Proceedings of the Second Summer Conference on Argumentation*, edited by George Ziegelmueller and Jack Rhodes (Annandale, Virginia: Speech Communication Association, 1981), p. 533.

[3]Lionel Ruby, *The Art of Making Sense* (Philadelphia: J. B. Lippincott Company, 1968), p. 28.

[4]Daniel McDonald, *The Language of Argument*, third edition (New York: Harper & Row, Publishers, 1980), p. 5.

[5]Joel B. Grossman and Richard S. Wells, *Constitutional Law and Judicial Policy Making* (New York: John Wiley and Sons, Inc., 1972), p. 147.

The same is true with questions of justiciability, though distinct from jurisdiction. In both cases, those issues must be decided before the court may hear the case.

[6]*Ibid.* Justice Frankfurter made a practice of deciding justiciability after hearing argument in certain types of cases. Frankfurter was quoted as saying: "The course of arguments and briefs on the merits may disclose that a case appearing on the surface to warrant a writ of certiorari does not warrant it. . . ." Daniel Berman, "The Case of Mr. Justice Frankfurter," *New Jersey State Bar Journal*, V. 2 (1958), pp. 149 and 168-169, cited in Grossman and Wells, p. 152.

[7]Edward L. Barrett, Jr., *Constitutional Law: Cases and Materials* (New York: Foundation Press: University Casebook Series, 1977), p. 63. Although the issues of jurisdiction and justiciability are distinct, they both fulfill the same functions in drawing a parallel to the debate issue of topicality.

[8]Scott Armstrong and Bob Woodward, *The Brethren* (New York: Simon & Schuster, 1979), p. 169. Justice Stewart's thoughts on the abortion cases were described: "Stewart thought that abortion was one of those emotional issues that the Court rarely handled well. Yet it was becoming too important to ignore. Abortion was a political issue. . . . The public was ripe for abortion reform. . . . Precisely because of their political nature, the Court should avoid them. But the state legislatures were always so far behind. Few seemed likely to amend their abortion laws. Much as Stewart disliked the Court's being involved in this kind of controversy, this was perhaps an instance where it had to be involved." (Armstrong and Woodward, pp. 167-168.) Thus, at least according to Stewart, though the Court traditionally shuns cases involving political questions, Court intervention was necessary.

[9]John Pacilio, Jr. and William H. Stitles, *Introduction to Debate* (Boulder: Pruett Publishing Company, 1967), pp. 2 and 6.

[10]Kane, "The Question Is Who Is To Be Master," p. 7.

[11]Cole Campbell, *Competitive Debate* (Chapel Hill, North Carolina, Information Research Associates, 1974), p. 155.

[11]*Ibid.*

[12]Robert Covington, *Cases and Materials for A Course on Legal Methods* (Mineola, New York: Foundation Press, Inc., 1969), p. 275.

[13]Allan Lichtman, Daniel Rohrer, Jerome Corsi, "The Debate Resolution," *Advanced Debate*, second edition, edited by David Thomas (Skokie, Illinois: National Textbook Company, 1979), p. 86.

[14]Parson, "On 'Being Reasonable,'" p. 534.

[15]Corpus Juris Secundum, V. 75 (1980 Supplement), p. 108.

[16]*Ballantine's Law Dictionary*, third edition, 1969, p. 1060.

[17]"1981 National Debate Tournament Final Debate: Should the United States Significantly Increase Its Foreign Military Commitments," edited by John K. Boaz, *Journal of the American Forensic Association*, V. 18 (Summer 1981), p. 27.

[18]James J. Unger, "The Words of A Debate Proposition and the Debate Subject Matter: Friends or Foes," a paper presented to the Speech Communication Association Convention in Anaheim, California, November 14, 1981, p. 4.

[19]*Ibid*, pp. 4-5.

[20]David Williams, (ed), *U.S. Trade, Weapons, and Assistance Policies: Perspectives and Issues* (Lawrence, Kansas: Jayhawk Debate Research, 1979), Part I p. 10.

[21]John Brigham, *Constitutional Language: An Interpretation of Judicial Decision* (Westport: Greenwood Press, 1977), p. 58.

[22]Paul Roberts, *Patterns of English* (Chicago: Harcourt, Brace & World, Inc., 1956), p. 12.

[23]*Ibid.*, p. 85.

[24]*Ibid.*, p. 53.

[25]Jerome Frank, *Courts on Trial, Myth and Reality in American Justice* (New York: Antheneum, 1970), p. 299.

[26]Roberts, *Patterns of English*, p. 26.

[27]Ralph Long, *The Sentence and Its Parts: A Grammar of Contemporary English* (Chicago: University of Chicago Press, 1961), p. 1.

[28]Jerold Katz, "The Realm of Meaning," *Communication, Language and Meaning*, edited by George Miller (New York: Basic Books, 1974), pp. 44-45.

[29]Covington, *Cases and Materials for A Course on Legal Methods*, p. 279.

[30]Campbell, *Competitive Debate*, p. 113.

[31]S. I. Hayakawa, *Language in Thought and Action* (New York: Harcourt, Brace & Co., Inc., 1949), p. 62.

[32]James Luck, *The Forensic*, May 1978, p. 4-5.

[33]Farhang Zabeeh, as quoted in Brigham, *Constitutional Language*, p. 83.

[34]*Words and Phrases*

[35]Parson, *"On 'Being Reasonable'"*, p. 540.

[36]Campbell, *Competitive Debate*, p. 113.

[37]Ivor A. Richards and Charles K. Ogden, *The Meaning of Meaning*, eighth edition (New York: Harcourt, Brace & Company, Inc., 1946), p. 113.

[38]Brigham, *Constitutional Language*, p. 77.

[39]*Weiner v. Valentine*, Sup., 17 N.Y.S. 2d, 355, 360, as cited in *Words and Phrases*, permanent edition, V. 36 (St. Paul: West Publishing Company, 1962), p. 412.

[40]Campbell, *Competitive Debate*, p. 114.

[41]Barrett, *Constitutional Law*, p. 224, citing Justice Sutherland in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

[42]*Ibid.*, p. 34, citing Justice Story in *Martin v. Hunter's Lessee*, 4 L.Ed 579 (1816).

[43]Michael Pfau, "Inherency: A Dependent Phenomenon," *Debate Issues*, V. 12, no. 6 (March 1980), pp. 6-7.

[44]*Corpus Juris Secundum*, V. 30A (1965), p. 1027. "In its primary sense it [establish] has been defined as meaning to bring into being, create, or originate."

[45]*Ibid.*, p. 1029. "The word 'establish' embraces the idea of stability as well as beginning an enterprise, (and includes) the idea of fixing firmly, of making stable and permanent. . . . It has been held that whether the popular use of the word, or the definition of it by the most approved lexicographers, is considered, it must be understood to mean not merely to designate, but to create erect, build, prepare, or fix permanently; to fix unalterably; . . . to originate and secure the permanent existence of. . . ."

[46]*Ibid.*, p. 1030. "The word 'establish' is sometimes used in the sense of proof, and, in the sense of appoint, acknowledge, or recognize.

[47]Frank, *Courts on Trial*, p. 300, citing Judge Learned Hand, "The Speech of Justice," 29 *Harvard Law Review* 617, 620 (1916).

[49]*Ibid.*, p. 299.
[50]Campbell, *Competitive Deoate,* p. 114.
[51]Frank, *Courts on Trial,* p. 293.
[52]Barrett, *Constitutional Law,* p. 653, citing Justice Peckham in *Lochner v. New York,* 198 U.S. 45.
[53]Campbell, *Competitive Debate,* p. 114.
[54]Frank, *Courts on Trial,* p. 294.
[55]"Twentieth Annual Review of Criminal Procedure: United States Supreme Court and Court of Appeals 1981-1982," *Georgetown Law Journal,* V. 71, Issue 2 (December 1982).
[56]Campbell, *Competitive Debate,* p. 114.
[57]Frank, *Courts on Trial,* p. 307.
[58]Parson, "On 'Being Reasonable,'" p. 536.

CHAPTER 8

A BIBLIOGRAPHY ON DEBATE THEORY

PERIODICALS

PARADIGMS

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Causal relationships are explored and the implications of a systems analysis approach to argumentation is discussed.

Lichtman, Allan and Rohrer. Daniel. "The Logic of Policy Dispute." *Journal of the American Forensic Association,* 17 (Spring 1980), pp. 236-47.
Policy propositions call for comparisons between competing policies. Includes discussion of should/would.

Lichtman, Allan and Rohrer, Daniel. "Policy Dispute and Paradigm Evaluation: A Response to Rowland." *Journal of the American Forensic Association,* 19 (Winter 1982), pp. 145-50.
A defense of policy-making in debate in light of Rowland's assessment.

Rohrer, Daniel. "Policy Systems Debate: A Universal Paradigm of Argumentation Theory." ERIC ED 169 570, Speech Communication Association Meeting. 1978, p. 35.

Rowland, Robert. "Standards for Paradigm Evaluation." *Journal of the American Forensic Association,* 19 (Winter 1982), pp. 133-40.
Critical analysis of debate paradigms, both functionally and theoretically. Rowland argues it is time for a change.

Rowland, Robert. "The Primacy of Standards for Paradigm Evaluation: A Rejoinder." *Journal of the American Forensic Association,* 19 (Winter 1982), pp. 154-60.
Rejoinder to his first article on debate paradigms, and refutation of his views in light of the attacks by Zarefsky, Lichtman and Rohrer, and Ulrich

Ulrich, Walter. "Flexibility in Paradigm Evaluation." *Journal of the American Forensic Association,* 19 (Winter 1982), pp. 151-53.
A response to Rowland, claiming that flexibility in negative strategy is the superior ideal.

Zarefsky, David. "The Perils of Assessing Paradigms." *Journal of the American Forensic Association,* 19 (Winter 1982), pp. 141-44.
Response to Rowland's critique of the current debate paradigms. Zarefsky supports the hypothesis testing paradigm for debate.

Zarefsky, David. "Argument as Hypothesis-Testing." ERIC ED 136 324, Speech Communication Association Meeting. 1976, p. 18.
Hypothesis testing should be used in evaluating resolutions.

COUNTERPLANS

Hynes, Thomas. "Study: Hope or False Promise." *Journal of the American Forensic Association,* 17 (Winter 1980), pp. 192-98.

Article focuses on the feasibility of study counterplans, with the general conclusion that, after studying a problem, the policy made is not superior.

Kaplow, Louis. "Rethinking Counterplans: A Reconciliation with Debate Theory." *Journal of the American Forensic Association,* 18 (Spring 1981), pp. 215-26.

Kaplow explains the general theory of the counterplan and its use as negative strategy.

Lichtman, Allan and Rohrer, Daniel. "A General Theory of the Counterplan." *Journal of the American Forensic Association,* 12 (Fall 1975), pp. 70-79.

General article describing use of counterplans. Article posits two criteria for competitiveness of the counterplan heretofore never discussed.

Ulrich, Walter. "A Theoretical Discussion of the Counterplan." ERIC ED 150 642, Speech Communication Association Meeting. 1977, p. 11.

Explains requirements of the counterplan — its implications and conditions for use.

INCREMENTALISM

Pfau, Michael. "The Present System Revisited, Part One: Incremental Change." *Journal of the American Forensic Association,* 17 (Fall 1980), pp. 80-84.

Discussion focuses on describing incrementalism, and its application in debate. Pfau describes the pro's and con's of incrementalism as a negative debate strategy.

Pfau, Michael. "The Present System Revisited Part Two: Policy Interrelationships." *Journal of the American Forensic Association,* 18 (Winter 1981), pp. 146-54.

The direct and indirect impacts of a policy are discussed. Emphasis is placed on the symbolic nature of an affirmative plan.

RISK ANALYSIS

Follert, Vincent. "Risk Analysis: Its Application to Argumentation and Decision-making." *Journal of the American Forensic Association,* 18 (Fall 1981), pp. 99-108.

In awarding a decision in a debate, a judge can base the decision on risk analysis.

VALUE ARGUMENTATION

Matlon, Ronald. "Debating Propositions of Value." *Journal of the American Forensic Association,* 14 (Spring 1978), pp. 194-204.

Relevant discussion of value argumentation in assigning the burden of proof, presumption and the foci of issues.

Warnick, Barbara. "Arguing Value Propositions." *Journal of the American Forensic Association,* 18 (Fall 1981), pp. 109-19.

An overview of value argumentation and its relationship in policy debate.

Wenzel, Joseph and Hample, Dale. "Categories and Dimensions of Value Propositions: Exploratory Studies." *Journal of the American Forensic Association,* 11 (Winter 1975), pp. 121-30.

Studies and their conclusions are discussed describing the dimensions of ordinary people's understandings of values.

COUNTER-WARRANTS

Keeshan, Marjorie and Ulrich, Walter. "A Critique of the Counter-Warrant as a Negative Strategy." *Journal of the American Forensic Association,* 17 (Winter 1980), pp. 199-203.
Background on why counter-warrants are an unwise and burdensome strategy, both theoretical and pragmatic indictments of the strategy.

REFUTATION

Dudczak, Craig. "Direct Refutation in Propositions of Policy: A Viable Alternative." *Journal of the American Forensic Association,* 17 (Spring 1980), pp. 232-35.
Discussion focusing on disproving argument with proof of the contrary, denial, or proof of an alternative viewpoint, thus denying the affirmative analysis.

INHERENCY

Cherwitz, Richard and Hikins, James. "Inherency as Multidimensional Construct: A Rhetorical Approach to the Proof of Causation." *Journal of the American Forensic Association,* 14 (Fall 1977), pp. 82-90.
Inherency is the sum-total of causes which act to block solution of an existing ill.

Cox, J. Robert. "Attitudinal Inherency: Implications for Policy Debate." *The Southern Speech Communication Journal,* 40 (Winter 1975), pp. 158-68.
Affirmative takes on many burdens when claiming attitudinal inherency. The agency involved must be able to implement the policy change; must have the authority to do it; and must be able to withstand circumvention.

Goodnight, Tom; Balthrop, Bill and Parson, Donn. "The Problem of Inherency; Strategy and Substance." *Journal of the American Forensic Association,* 10 (Spring 1974), pp. 229-40.
New emphasis on the importance of inherency as a substantial and complex explanation of causation.

Schunk, John. "A Farewell to 'Structural Change': The Cure for Pseudo-Inherency." *Journal of the American Forensic Association,* 14 (Winter 1978), pp. 144-49.
Can the affirmative advantages be claimed without the resolution? If so, there is no inherency.

Ulrich, Walter. "Towards a Justification of Inherency." ERIC ED 123 666, Kansas State Speech Association Meeting. 1976, p. 14.
Inherency requires causal explanation.

Zarefsky, David. "The Role of Causal Argument in Policy Controversies." *Journal of the American Forensic Association,* 13 (Spring 1977), pp. 179-91.
Zarefsky argues the need for causal argumentation and puts forth the agent-motive-means test for causal proofs.

ALTERNATIVE JUSTIFICATION

Lichtman, Allan; Garvin, Charles and Corsi, Jerry. "The Alternative Justification Affirmative: A New Case Form." *Journal of the American Forensic Association,* 10 (Fall 1973), pp. 56-69.
Explanation of the A-J case, its justification and historical development.

Morello, John. "A Critique of the Alternative Justification Affirmative Case." ERIC ED 101 388, Speech Communication Association. 1974, p. 14.
A-J cases are illegitimate and should not be accepted as new theory.

Seltzer, Robert. "The Alternative Justification Affirmative: Theoretical and Practical problems." *Journal of the American Forensic Association,* 11 (Winter 1975), pp. 131-36.
A-J cases lower the quality of debate by divorcing it from the real world because of their complexity and denial of issue development.

CONCOMITANT ADVANTAGES

Flanningam, Carl. "Concomitant vs. Comparative Advantages: Sufficient vs. Necessary Conditions." *Journal of the American Forensic Association,* 18 (Summer 1981), pp. 1-8.
When a plan is adopted and is topical, but the advantages are attained attendant the resolution, they are therefore known as concomitant advantages or spinoffs.

GOALS CASE

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NATIONAL FEDERATION DEBATE MATERIALS

1983-84 DEBATE TOPIC MATERIAL

NATIONAL FEDERATION TO PUBLISH GUIDE ON CRIMINAL JUSTICE

The National Federation is pleased to publish a **guide for the 1983-84 high school debate topic** area. Written by high school and college debate coaches, this publication documents the legislative history of the topic area as it evolved through the wording committee and was finally selected by the Advisory Council.

Authors thoroughly familiar with the topic selection process reflects on the thinking that went into this year's resolutions.

After providing background on the topic selection, the **Criminal Justice National Federation Debate Guide** provides: 1) an analysis of the intended scope of the topic area, 2) sample case ideas, 3) affirmative analysis, 4) negative analysis, 5) special assistance on how to find difficult-to-locate sources, 6) and an extensive, annotated bibliography of the topic area.

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